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No. 600.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

TRANSCRIPT OF RECORD.

Error to the District Court of the United States for the District of Idaho.

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In the District Court of the United States, within and for the District of Idaho.

October Term, A. D. 1899.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Violation Sections 3995, 5440, R. S. U. S.

Indictment.

First Count.

The Grand Jurors of the United States of America, within and for the District of Idaho, being duly sum-

moned, sworn, and impaneled in the name and by the authority of the United States of America, upon their oaths do find and present: That Louis Salla, Frank Barony, Morris Flynn, Francis Butler, Napoleon Nevella, John Lucinetti, Dennis O'Rourke, Fred. Shaw, Pat. Adudell, Mike Malvey, A. C. Austin, James Cazzaglio, John Doe Parker, George C. Calladge, William Wright, Ed. Boyle, Thomas Murry, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, C. J. Olson, Ed. Albinola, John Burt, Alex. Wills, Paul Corcoran, William Bundren, Joe Vella, Marcus Daly, Mike Wells, Dennis Larry, Pat. Gerard, C. R. Burris, and others whose true names are to the grand jurors unknown, on the 29th day of April, A. D. 1899, at the county of Shoshone, within the Northern Division of the District of Idaho, and within the jurisdiction of this court, then and there being, did then and there unlawfully, wickedly, and maliciously confederate and conspire together to commit an offense against the United States, that is to say, to unlawfully, willfully, maliciously, and knowingly delay, prevent, obstruct, and retard the movement and passage of a certain railway car and train over the lines and tracks of the Northern Pacific Railway Company by the said Northern Pacific Railway Company, the said Northern Pacific Railway Company then and there being engaged in the business of a common carrier of the mails of the United States, which said railway car and train were then and there carrying and transporting the mails of the United States, and to effect the object of the said conspiracy, the said defendants, on the 29th day of April,

A. D. 1899, at the county of Shoshone within the district aforesaid, and within the jurisdiction of this court, then and there being, did then and there unlawfully, forcibly, maliciously, and knowingly delay, arrest, obstruct, and retard the movement and passage of a certain railway car and train over the lines and tracks of the Northern Pacific Railway Company by the said company, the said Northern Pacific Railway Company being then and there engaged in the business of a common carrier of the mails of the United States, which said railway car and train were then and there carrying and transporting the mails of the said United States, by then and there unlawfully, willfully, knowingly, maliciously, and forcibly arresting, delaying, stopping, obstructing, and backing the said mail-car and train as aforesaid; against the peace and dignity of the United States and contrary to the form, force, and effect of the statutes in such cases made and provided.

Second Count.

And the grand jurors aforesaid, in the name and by the authority of the United States aforesaid, upon their oaths aforesaid, do further find and present, that the said Louis Salla, Frank Barony, Morris Flynn, Francis Butler, Napoleon Nevella, John Lucinetti, Dennis O'Rourke, Fred. Shaw, Pat. Adudell, Mike Malvey, A. C. Austin, James Cazzaglio, John Doe Parker, George C. Calladge, William Wright, Ed. Boyle, Thomas Murry, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, C. J. Olson, Ed. Albinola, John Burt, Alex Wills, Paul Corcoran, William Bundren, Joe Vella, Marcus Daly, Mike

Wells, Dennis Larry, Pat. Gerard, C. R. Burris, and others whose true names are to the grand jurors unknown, on the 29th day of April, A. D. 1899, at the county of Shoshone, within the Northern Division of the District of Idaho, and within the jurisdiction of this court, then and there being, did then and there unlawfully, wickedly, maliciously, willfully, and knowingly obstruct, delay, prevent, and retard the movement and passage of the mails of the United States by then and there unlawfully, wickedly, maliciously, willfully, and knowingly seizing controlling, stopping, delaying, and backing a certain railway car and train then and there containing the mails of the United States, and which said railway car and train were then and there being run and transported over the railway lines and tracks of the Northern Pacific Railway Company by the said Northern Pacific Railway Company, the said Northern Pacific Railway Company then and there being engaged in the business of a common carrier of the mails of the United States; against the peace and dignity of the United States, and contrary to the form, force, and effect of the statutes in such cases made and provided.

Third Count.

And the grand jurors aforesaid, in the name and by the authority of the United States aforesaid, upon their oaths aforesaid, do further find and present, that the said Louis Salla, Frank Barony, Morris Flynn, Francis Butler, Napoleon Nevella, John Lucinetti, Dennis O'Rourke, Fred. Shaw, Pat. Adudell, Mike Malvey, A. C. Austin, James Cazzaglio, John Doe Parker, George C. Calladge,

William Wright, Ed. Boyle, Thomas Murry, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, C. J. Olson, Ed. Albinola, John Burt, Alex Wills, Paul Corcoran, William Bundren, Joe Vella, Marcus Daly, Mike Wells, Dennis Larry, Pat. Gerard, C. R. Burris, and others whose true names are to the grand jurors unknown, on the 29th day of April, A. D. 1899, at the county of Shoshone, within the Northern Division of the District of Idaho, and within the jurisdiction of this court, then and there being, and then and there acting together, did then and there unlawfully, willfully, wickedly, maliciously, forcibly, and knowingly obstruct and retard the passage of the mails of the United States, by then and there unlawfully, wickedly, willfully, maliciously, forcibly, and knowingly stopping, delaying, and retarding and sidetracking a certain railway car and train then and there containing and carrying the mails of the United States, which said railway car and train were then and there being run and transported over the railway lines and tracks of the Oregon Railroad and Navigation Company by the said Oregon Railroad and Navigation Company, the said Oregon Railroad and Navigation Company then and there being engaged in the business of a common carrier of the mails of the United States; against the peace and dignity of the United States, and contrary to the form, force, and effect of the statutes in such cases made and provided.

R. V. COZIER,

United States Attorney, District of Idaho.

J. I. MITCHAM,

Foreman of the United States Grand Jury.

Names of witnesses examined before the United States grand Jury upon finding the foregoing indictment:

J. M. Porter,
Thomas M. Ames,
James B. Pipes,
Joseph Kendall,
Jake Bloom,
Thomas Chaster,
E. D. Booth,
J. H. Martin,
M. J. Sinclair,
Joe Phifer,
George A. Olmstead,
Wm. McMurtry,
Emil Anderson,
A. W. Perley,
John C. Boyd,
Thos. Jay,
John Clarke,
A. M. St. Clair,
L. W. Hutton,
Thos. Wright,
Joseph A. Beddell,
Geo. K. Marshal,
A. S. Crawford,
Amos Jay.

[Endorsed]: No. 410. United States District Court, within and for the Northern Division of the District of Idaho. The United States vs. Louis Salla et al. Indictment for Violation, Sections 3995 and 5440, R. S. U. S. A true bill. J. I. Mitcham, foreman grand jury. Filed Oct. 25th, 1899. A. L. Richardson, Clerk. R. V. Cozier, U. S. Attorney.

In the District Court of the United States, within and for the District of Idaho.

October Term, A. D. 1899.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Defendants' Motion to Elect.

Now come the defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Fred. Shaw, Mike Malvey, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, William Bundren, and C. R. Burris, and move the Court for an order requiring the United

States attorney, R. V. Cozier, Esq., to elect as to whether he will proceed to try the defendants on the first count in said indictment, or whether he will proceed to try the defendants on the second or third count, or both counts, contained in said indictment.

CLAY McNAMEE,
PATRICK REDDY,
Attorneys for Defendants.

[Endorsed]: No. ——. District Court of the United States, District of Idaho. The United States of America, Plaintiff, vs. Louis Salla et al., Defendants. Defendants' motion to elect. Filed Oct. 26th, 1899. A. L. Richardson, Clerk. Patrick Reddy, C. W. McNamee and Peter Breen, Attys. for Defendants.

In the District Court of the United States, within and for the District of Idaho.

October Term, A. D. 1899.

THE UNITED STATES OF AMERICA,

Plaintiffs.

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Demurrer to Indictment.

Now come Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Fred Shaw, Mike Malvey, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, William Bundren, and C. R. Burris, defendants named in the above-entitled action, and for themselves and each of them, demur to the indictment in this action,

filed in this court of the 25th day of October, A. D. 1899, upon the following grounds, to wit:

That there is a misjoinder of counts in said indictment in this:

I.

That the first count of said indictment charges the defendants, with others, with the commission of a felony, to wit, a conspiracy to obstruct and retard the passage of the United States mail in violation of section 5440 of the Revised Statutes of the United States; and the second count charges the defendants, with others, with the commission of a misdemeanor, to wit, willfully and knowingly obstructing and retarding the passage of the mails of the United States in violation of section 3995 of the Revised Statutes of the United States.

That the third count also charges the defendants, with others, with the commission of a misdemeanor, to wit, willfully and knowingly obstructing and retarding the passage of the mails of the United States in violation of section 3995 of the Revised Statutes of the United States.

II.

That the first count charges the defendants with the commission of a felony, and the second count charges the defendants with the commission of a misdemeanor, and the third count charges the defendants with the commission of a misdemeanor, and, therefore, a count for felony and one for misdemeanor are joined in the indictment.

That the said several counts are not for the same act or transaction, or for two or more acts or transactions

connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined.

III.

That the indictment does not show that the counts refer to the same act or transaction, or to two or more acts or transactions connected together, or to two or more acts or transactions of the same class of crimes or offenses which may be properly joined.

IV.

That the offense alleged in the first count and the offenses alleged in the other two counts contained in the indictment are separate and distinct offenses and in nowise related to each other; different penalties are prescribed by law, and the challenges to the jurors on the first count are different from those allowed on the second count and third count, and a different procedure is required in the trial of the causes.

V.

And the defendants specially demur to the first count contained in said indictment upon the ground:

That the facts stated in said first count do not constitute a public offense.

That said count is insufficient in this: that it does not appear upon the face of said count in said indictment that the said Northern Pacific Railway Company was authorized by law or by the United States to carry the mail of the United States in said car or over the lines or tracks described in said count, on the 29th day of April, 1899, or at

any other time, or that said Northern Pacific Railway Company was ever authorized by law or by the United States, or otherwise, to carry said United States mails over said lines or tracks or elsewhere, or that said United States mail was ever delivered to said Northern Pacific Railway Company for carriage from any one place to another or from any one postoffice to another.

VI.

And the defendants specially demur to the second count contained in said indictment upon the ground:

That the facts stated in said count do not constitute a public offense.

That said count is insufficient in this: that it does not appear upon the face of said count in said indictment that the said Northern Pacific Railway Company was authorized by law or by the United States to carry the mail of the United States in said car or over the lines or tracks described in said count, on the 29th day of April, 1899, or at any other time, or that said Northern Pacific Railway Company was ever authorized by law or by the United States, or otherwise, to carry said United States mails over said lines or tracks, or elsewhere or that said United States mail was ever delivered to said Northern Pacific Railway Company for carriage from any one place to another or from any one postoffice to another.

VII.

And the defendants specially demur to the third count contained in said indictment upon the ground:

That the facts stated in said third count do not constitute a public offense.

That said count is insufficient in this: that it does not appear upon the face of said count in said indictment that the said Northern Pacific Railway Company was authorized by law or by the United States to carry the mail of the United States in said car or over the lines or tracks described in said count, on the 29th day of April, 1899, or at any other time, or that said Northern Pacific Railway Company was ever authorized by law or by the United States, or otherwise, to carry said United States mails over said lines or tracks, or elsewhere, or that said United States mail was ever delivered to said Northern Pacific Railway Company for carriage from any one place to another or from any one postoffice to another.

CLAY McNAMEE,
PATRICK REDDY,
Attorneys for Defendants.

[Endorsed]: No. 410. In the District Court of the United States within and for the District of Idaho. The United States of America, Plaintiff, vs. Louis Salla et al., Defendants. Demurrer to indictment. Filed Oct. 26th, 1899. A. L. Richardson, Clerk.

In the District Court of the United States, within and for the District of Idaho.

October Term, A. D. 1899.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Motion to Quash Indictment.

Now come Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Fred Shaw, Mike Malvey, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, William Bundren, and C. R. Burris, defendants named in the above-entitled action, and for themselves

and each of them, move to quash the indictment in this action filed in this court on the 25th day of October, A. D. 1899, upon the following grounds, to wit:

That there is a misjoinder of counts in said indictment in this:

I.

That the first count of said indictment charges the defendants, with others, with the commission of a felony, to wit, a conspiracy to obstruct and retard the passage of United States mail in violation of section 5440 of the Revised Statutes of the United States; and the second count charges the defendants, with others, with the commission of a misdemeanor, to wit, willfully and knowingly obstructing and retarding the passage of the mails of the United States in violation of section 3995 of the Revised Statutes of the United States.

That the third count also charges the defendants, with others, with the commission of a misdemeanor, to wit, willfully and knowingly obstructing and retarding the passage of the mails of the United States in violation of section 3995 of the Revised Statutes of the United States.

II.

That the first count charges the defendants with the commission of a felony, and the second count charges the defendants with the commission of a misdemeanor, and the third count charges the defendants with the commission of a misdemeanor, and, therefore, a count for felony and one for misdemeanor are joined in the indictment.

That the said several counts are not for the same act or

transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined.

III.

That the indictment does not show that the counts refer to the same act or transaction, or to two or more acts or transactions connected together, or to two or more acts or transactions of the same class of crimes or offenses which may be properly joined.

IV.

That the offense alleged in the first count and the offenses alleged in the other two counts contained in the indictment are separate and distinct offenses, and in nowise related to each other; different penalties are prescribed by law, and the challenges to the jurors on the first count are different from those allowed on the second count and third count, and a different procedure is required in the trial of the causes.

CLAY McNAMEE,
PATRICK REDDY,
Attorneys for Defendants.

[Endorsed]: No. 410. District Court of the United States within and for the District of Idaho. The United States of America, Plaintiff, vs. Louis Salla et al., Defendants. Motion to quash the indictment. Filed Oct. 26th, 1899. A. L. Richardson, Clerk.

In the District Court of the United States, within and for the District of Idaho.

October Term, A. D. 1899.

THE UNITED STATES OF AMERICA,
Plaintiff,

Against

LOUIS SALLA et al.,
Defendants.

Instructions Given By Court.

Charge to the Jury (Orally Given).

Gentlemen of the Jury:—I heartily congratulate you that this case is nearing its conclusion—at any rate, the mantle of responsibility that has rested upon the Court and its officers is about to fall upon your shoulders, and it will devolve upon you to say when this case shall be determined, after the instructions which I give you. The Court has endeavored, during the trial of this cause, to keep out of it matters that are not pertinent to it. It is nearly always the case, however, in a lengthy trial that there will be some matters slip in that should properly be left out, and I desire to draw your attention simply to that which belongs in the case, and try to exclude from your minds everything which does not belong, and certainly you will allow nothing whatever which is outside of the record to influence you in any way.

The Government has been referred to here—the general Government—as a mighty government, a strong government prosecuting these weak men. Well, of course, gentlemen of the jury, I am proud, and you are proud, that our Government is strong; it is something we may be proud of, but, at the same time, while we rejoice in the strength of our Government, we must all understand that the Government does not seek injustice, or the punishment of any of its citizens unjustly. When you stop to think of it—what is the Government? It is often spoken of as though it was some foreign power, some power inimical to our interests. Why, gentlemen, the Government of the United States is nothing more than the people of the United States—you, yourselves, constitute a part of that Government. You are, to be sure, here acting under the direction of the Government, as its ministers, as its officers, to enforce its laws. Its laws, I say—the laws that you, yourselves, *held* to make, and you, yourselves, are responsible for. We are all, as citizens of this Government, responsible for the laws that exist, and I confess I get somewhat impatient when I find reference made to the Government, as if it were an institution or an organization inimical to the interests of the people at large. It is not; it is nothing more than the people themselves. Now, then, disabuse your minds of all references of the kind that may tend to prejudice you, or may tend to make you feel that there is some great power here trying to persecute some innocent person. That is not the case, in any case the Government ever institutes. I regret, too, that reference has been made to our State Government. We

have nothing whatever to do with that in this case. The State Government, undoubtedly, is doing what it can to suppress wrong and to follow the law, and it should not be criticised in this prosecution or in this case. And the governor of the State, I regret, has been referred to in a way that should not have been. I, for one, am ready to uphold the commands of the governor, or any other officer who was honestly trying to perform his duty and enforce the law properly.

Now, I want to withdraw from your minds all these references that have been made that do not pertain or belong to the case. All these references that have been made to what is termed "improper treatment of these parties in the Coeur d'Alene country"; that is an issue that is not here, and if it were, why, then, we would be entitled to testimony upon both sides to determine whether wrong had been inflicted or not, or whether or not great injustice had been done anyone, or great punishment had been inflicted upon anyone. Those matters are not before you at all, so that I ask you now to disabuse your minds of any references that have been made in this case of any matters that do not belong to the issue. And I am satisfied, gentlemen, from the earnest attention which I am happy to say you have given this case all the way through—long as it has been—that you are impressed with the idea and the feeling that you are here as jurors, and that you are to do justice between the people of this Government and these defendants at the bar. There are, before I come to the main and important questions in this case, a few preliminary instructions which I

desire to give you in view of the testimony; and the first is, as to the credibility of witnesses.

You are the sole judges of the credibility of witnesses; that is, you are to determine as to the truth of the testimony given in the case, and while it is the right of the Court to express its views of the testimony, it is still your duty and province, notwithstanding any views that the Court may entertain or express, to reach your conclusions by the exercise of your own judgment, after a careful examination of all the testimony. Your object and your duty is to learn the truth, through the testimony of the witnesses, and to do this you must endeavor, especially since the testimony is conflicting in this case, to discriminate between the true and the false—to separate the wheat from the chaff. You are not bound to believe as truthful the testimony of any witness, when you are satisfied or convinced that it is false. As aids, in judging of the veracity of a witness you may take into consideration his manner, his bearing upon the stand, his interest in the result of the case, whether he entertains enmity against the parties, or has a personal interest or desire for their acquittal, and in this connection you will consider the relationship witnesses may bear to the defendants, either the relations of kinship, or as members of the same organization or society, or any other fact concerning their situation that would tend, in your opinion, to influence their testimony, and generally, whether under all the circumstances of the case the testimony of a witness is reasonable or probable—whether it is corroborated by other

facts or circumstances in the case that are clearly shown to exist.

Generally, testimony may be weighed somewhat by the number of witnesses upon opposite sides of the same question, but this is far from an invariable rule. In other words, you are not bound to take the testimony of a majority or a greater number of witnesses when you believe it is not truthful, and you may, when convinced of the truth of a minority of witnesses, take their statements as true. In all cases you are to take as truthful testimony of the witnesses whom you are convinced have testified truthfully, and to discard that which you believe is not true, and, as before said, you must be the judges of that which is true and that which is false. Of course this does not mean that you may arbitrarily say that the testimony of one witness is true, and that of another is false, but you must be governed, in reaching such a decision, by the circumstances and evidence of truth, to which I have already referred.

As another proposition of law, I instruct you that it is the law in criminal cases, that before an accused party can be found guilty of a charge against him, you must be satisfied of his guilt beyond a reasonable doubt. This, however, does not mean that you must be convinced to a degree of absolute certainty or to such a degree as will exclude all doubt. As a rule, crimes are not committed generally in the searching light of day, but more frequently under the cover of darkness, and without the range of human observation, so it often follows that they must be shown by what is termed "circumstantial evidence."

What, then, is the meaning of the term "reasonable doubt"? I may add, that it is difficult to give such an exact definition of the term as that jurors will clearly comprehend it, but it is such a doubt that will naturally and without effort rise in your minds from the unsatisfactory nature of the testimony. It is such a doubt or such a state of mind as would cause a prudent man to consider—to inquire, before being willing to act in some important matter in which he is personally and much interested. It is not, however, a mere arbitrary doubt or mere vagary or fancy wrought up in the mind, through some imaginary state of facts; it is not a question of what may or might have been, but what is or was. You are not to go outside of the testimony, and, by indulging your imagination that this or that may have occurred, apply some theory which is not supported by the actual evidence given in the case.

Reasonable doubt is such as must grow out of the evidence only, but from the imagination, never. While your oath, as jurors, imposes upon you weighty obligations, it does not demand of you that you entertain any doubt which you would not, if not under oath. In other words, it is not required of you to doubt, as jurors, when, as men, you would believe. Consider, therefore, the testimony, and let it have its natural effect and weight upon your minds, unswerved by any bias, sympathy, or prejudice, and follow the conclusion which your best judgment dictates from the testimony. If that persuades you of the defendants' guilt, beyond such reasonable doubt as I have attempted to define, you should so find, but if you should still entertain such doubt, you should acquit.

In this connection I give you, at the request of defendants' counsel, their No. 2, upon the question of the burden of proof.

"The burden of proof is upon the prosecution in this case" to prove beyond a reasonable doubt:

"First.—That a conspiracy, or, in other words, an agreement, was entered into between two or more of the defendants to commit an offense against the United States; that is to say, to willfully and knowingly obstruct and retard the passage of the United States mail, as alleged in said first count.

"Second.—In addition, it must be proved beyond a reasonable doubt that one or more of said defendants committed some act to effect the object of the conspiracy.

"Third.—The prosecution must prove beyond a reasonable doubt that the defendants, or two or more of them, did agree, combine, and conspire to willfully and knowingly obstruct and retard the United States mail, as alleged in said first count. The alleged conspiracy may be proved by circumstantial evidence, if it be considered enough to convince the minds of the jury beyond all reasonable doubt that such conspiracy was formed. The burden of proof is upon the prosecution to prove, beyond a reasonable doubt, that the defendants were parties to said conspiracy."

And now, gentlemen, with these preliminary suggestions of the law, I come to the most important part of this case, and to which I ask your very careful attention. You have noticed that this indictment had in it, originally,

three counts, the first of which charged a conspiracy to obstruct the mails of the United States. The other two charged an obstruction of the mails of the United States. Numbers two and three are dismissed by the motion of the prosecuting attorney, and, by the way, something has been said about that. I say to you, now, that he had a perfect right to dismiss those counts, and there is no reason why you should disbelieve the statement he made or reason he gave for dismissing them, but, in addition to that, I state to you that the dismissal cannot be construed as an admission, in any way, that the counts could not be proven. You will therefore consider only the first count of this indictment, just as if there never had been the other two counts in the indictment. The first count, or the only count in the indictment, is based upon two sections of the Statutes of the United States; the first being 5440, which is substantially in these words: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, in any manner, and if one or more of such parties do any act to effect the object of the conspiracy, all the parties to the conspiracy shall be liable to a penalty, etc. With that you have nothing to do—the penalty. The other section is 3995, which is: "Any person who shall knowingly and willfully obstruct and retard the passage of the mail, or any carriage, horse, and driver, or carrier carrying the same, shall for every such offense be punished, etc." In this indictment, under these two sections of the statute, there are involved these propositions: That a conspiracy was formed to commit an offense against the United States, and which, in

this case, is alleged was to obstruct and retard the passage of the United States mail. Now, that is an important part of this case; a conspiracy was formed to obstruct the passage of the United States mail. A second proposition is: That these defendants were members of such conspiracy. And the third is: That one or more persons belonging to such conspiracy did some act to carry out the conspiracy. The Supreme Court of the United States, which of course is our guide, has in general terms defined a conspiracy to be a combination of two or more persons to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means. You will see involved in that, two ideas: First, it is a combination of two or more persons to commit some unlawful act, and that is to be applied to this case. Now, your first duty will be to determine whether such a conspiracy was formed, as is contemplated by the statute, and it will be natural for you to ask what evidence must you have to show you that a conspiracy did exist. The statute includes any combination, association, or co-operation together of two or more persons, for the purpose of committing some offense against the United States. Conspiracies, being criminal, their organization, constitutions, plans, and agreements are not made public, but great care is observed to keep them secret. It would be unreasonable, therefore, to demand that such facts must be established by direct proof, but they may be shown by circumstantial evidence, just as most other crimes may be. It is not necessary to show that the parties to a conspiracy actually met together, and in a formal

manner agreed to enter into it. The essence of a conspiracy is the combination, the banding, agreeing, or working together, the common design, the concert of action by the parties, and any evidence which tends to show such facts is proper for your consideration. It may be shown by the different acts by different persons at different times and places, and when such acts, considered together, if unexplained, lead to the conclusion that they are all parts of one scheme, and, together, lead to the accomplishment of some unlawful object, they establish the conspiracy, and they are actors, as members of it. We cannot penetrate the minds of the conspirators to discover their real intentions or designs, but these, as in other criminal actions, may be reached through their actions, for men are presumed to intend what they actually do, and they will be held for what they do, unless their acts are explained and shown to be innocent of wrong intent.

I will invite your attention, briefly, to some of the facts which you must consider in determining whether or not this conspiracy or combination existed. It is beyond dispute that there was a conflict between the men who belonged to the different miners' unions in the Coeur d'Alenes and the Bunker Hill and Sullivan Mining Company. Which party was right in that is immaterial to you; you have nothing to do with that. I simply refer to the fact that there was a conflict of some kind between them, and that on this particular occasion there was an attempt made to enforce the rights which these men, belonging to these different associations, claimed. On the

29th day of April it appears that a large body of men reached the Kellogg station. You must take into consideration the manner in which they arrived there to determine whether there was any concert of action among them, or not. Your attention has already been called by counsel, as well as by the testimony of witnesses, as to how these parties gathered together. You will remember that on that particular day the mines in the upper part of the country, up the canyon, all ceased work, and, by the way, it may be noted here that those mines were generally worked by men belonging to the miners' union. Now, there is evidence of concert of action there, in the fact that they all ceased working on that day; that they came down from the different mines and from the different camps, as it would appear, by concert—at all events, they all arrived at about one time, and took possession of this railway train, and at the same time loaded on to it a large amount of powder. While these operations were going on there another crowd of men, who, it appears, belong also to the miners' union—at least largely so—at Wardner, had left the town of Wardner and gone up the railroad track, evidently to meet this incoming train. And, in that connection, you will bear in mind that this train was not due at that particular time—there was no regular train due that hour of the day and the train was there out of time, as I recollect the testimony. Now, you will consider—take all those facts into consideration, to determine whether or not there was any co-operation among these parties; whether this assembling together of all these men was the result of mere accident, or whether it

was the result of concerted action. If it was the result of concerted action, that is evidence of the combination. I might say here that the Court, possibly, and the jury might be relieved of any burden upon that question, because defendant's counsel has admitted in his argument that there was a conspiracy that day, or that there was a conspiracy organized to do some unlawful act, but I still prefer to give you the law, and let you reach your own conclusion from the evidence. Now, it is not sufficient simply to show that there was an assemblage together of these men, by concerted action, but it must appear that assembling was for some unlawful purpose, in order to constitute a conspiracy. Men might, by concerted action, in large numbers meet together, and it would not constitute a conspiracy. Men might, for instance, meet on that day by some common arrangement, at Wardner, for the purpose of innocently carrying out some celebration. That would not be a conspiracy—it might be called a meeting by concert, but to make it a conspiracy it must appear that the meeting was for some unlawful purpose. Now, let me direct your attention to that, and recall to your mind the circumstances connected with this assemblage of these men. You will bear in mind that those men—a large number of them—were masked, and a large number of them were armed. In addition to that they took with them a large amount of powder—my recollection is, about 4,000 pounds. They not simply took that, but they took it forcibly. I think the testimony shows they broke open doors to take it—to take what they had no right to take. There is some intimation that the men supposed that this was a peaceable mission, but you are

aware that men who are on peaceable missions do not hide their faces and their countenances by masks, and they do not go armed, and they would not likely, on a peaceable mission, carry with them the amount of powder that they had on that day. These are suggestions which ought to have convinced anyone who accompanied them, that this assemblage was not for a lawful purpose—on the contrary, it was for some unlawful purpose, and there were such suggestions as ought to have informed anyone along with them, that a crime was likely to be committed; but you can take, in addition to that, as further evidence that this assemblage was unlawful, what they actually did. Men are to be judged by what they do. We cannot enter into the minds of men and know what their intentions are, but their intentions must be judged by what they actually do. The facts show you that after these men had assembled at Wardner junction, or Kellogg, that certain crimes were committed there, and you are justified in presuming that these men went there with the expectation and intention of doing what they did. Then, you have before you, by the evidence, the fact of this gathering together, as I have called your attention to, and the further fact of the evidence that it was for some unlawful purpose. If you are convinced, then, that this assemblage was for an unlawful purpose, you have established by the testimony the existence of this conspiracy. The next question for you to determine is, What was the object of the conspiracy? Now, keep these facts separate in your mind: First, you must determine whether there was a conspiracy, and determine that by satisfying your minds whether or not these men were acting together by concert

of action, and whether it was for some unlawful purpose. Those two things being found, the conspiracy is established.

What was the object of the conspiracy? It is alleged in this indictment that the object of the conspiracy was to obstruct the passage of the United States mail. Undoubtedly, you must conclude that the chief design that these men had in view was not the seizure of the train, but was to enforce some plans they entertained against the Bunker Hill and Sullivan Company, and, as the evidence shows, they destroyed the mill. You are justified in concluding that this was a part, at least, of their intentions; for it is the law that men intend to do what they actually do, and you are fully justified in concluding that this was their object, from the general facts in the case, including the fact that they proceeded as directly as they could to do this particular act, but, notwithstanding, you may find that this alleged conspiracy was formed for the purpose of destroying the mill, you cannot, in this case, hold anyone for that offense. We have nothing here whatever to do with the offense or the crime that was involved in the destruction of that property. That is a matter that belongs to other courts and to other forums. But, in connection with the destruction of that property, you must bear in mind the other part of the transaction. The charge here is a conspiracy to interfere with the United States mails, and while, as suggested, the chief object of these men was directed against the Bunker Hill and Sullivan Company, if, in carrying out that scheme and to aid in carrying it out, they planned, schemed, and arranged to seize this train, or that the taking of the train was a

part of their general plan, and you so believe from the testimony, you are justified in finding that one of the objects of the alleged conspiracy was to obstruct and retard the United States mail, as charged in the indictment. Moreover, I say to you that as they did take possession of the train, and thereby delayed and obstructed the mail—and there is no explanation that it was innocently or lawfully done—the law presumes that they intended to do just what they did, and if you find from the testimony that this alleged conspiracy existed and that one of its objects in carrying out their chief object was to seize this train, then all who belonged to the conspiracy committed the offense charged in the indictment; provided, the train in question carried the United States mail.

Now, upon that point, I call your attention to one phase of this case. It was shown here that these cars were not marked mail-cars, as is generally the fact with mail trains in the country, but it further appeared in evidence that these were the cars that had always carried the mail on that road. They had no cars there at any time marked "United States Mail-Car"; but in addition to all that, even if they had no knowledge whatever that these were mail-cars, they are presumed to know that they were mail-cars; they are presumed to intend what they actually do. If they seized a train carrying the mail, they are presumed to have known that, and are chargeable with it, just the same as if they had known that the mail was in that train. Of course the evidence shows, beyond any dispute, that the mail was on that train at the time the train was seized.

One of the consequences resulting after a conspiracy is established is this: that every member who belongs to the conspiracy is bound and held for every act or thing done or said by any other member of the conspiracy, during its existence, and it does not matter whether the party was present or not at the time the particular act was committed. I wish you would bear that particularly in mind, that if—when you conclude the conspiracy is formed, then each man who belongs to that conspiracy, who was a member of it, is responsible for everything that was said or done by any other member, whether he is present or not.

Now, that applies in this case here, in this way: It is in evidence here that some of these defendants lived at Wardner and some, I believe, up the canyon. It is certainly clear here, by the evidence, that some of these defendants were not up at Gem, or where the train was seized, at the time the train was seized, but that does not exculpate them. If you find that they belong to an organization—if you find that they belong to the conspiracy, it does not matter whether they were present when the train was seized or not—they are just as guilty of the seizure of the train as if they had been present and helped to take it. That is a part of the law that applies especially to conspiracies; that each member is responsible and liable for what any other member of the conspiracy says or does, during the existence of the conspiracy.

What evidence have you that applies to these defendants, or shows that they were members of this conspiracy? I do not propose to go over that, other than to invite your attention to the testimony which has been pretty fully

gone over by counsel and so called to your attention that I think you are not likely to forget it, but I say to you that anything that you find that any of these defendants did that helped to carry out the general plans of that day is binding upon him. If you find that any of them went from Wardner down to where this train was coming in, and went with masks or went with guns, or if they said anything connected with it, showing that they were interested in it or taking a part in it, or if they were present there and apparently assisting or taking any part, it is all testimony for you to consider. I will add, however, that the mere fact that a party was present is not sufficient to bind him, or hold him a member of the conspiracy. He might have been present and looking on, and been an innocent party, so that it is not the mere presence of a party that should bind him, but it is his presence, taking some part, taking some interest, showing that he belongs in some way to the organization, or that he is assisting in carrying out what they are doing. Now, as I intimated before, what they did at Wardner or at Kellogg Junction is a part of the general plans of that day, and if you find men taking an active part at Wardner, it shows that they were a part of that combination—conspiracy—and hence, although they were not up when the train was taken, they are still guilty of what was done when the train was taken.

There are some other requests that counsel have asked me to give, but they are covered, I think, by what I have already stated. In fact, I think I have covered every proposition of law that has been asked.

I may here say, that counsel during the argument have made numerous suggestions, that the Court will instruct you so and so. I have not been able to keep track of all the suggestions that counsel have made in that way. Some that they have suggested were proper enough, and would have been proper for the Court to give, but I have preferred to give my own, and give you only such as I think are involved in the issues of the case, for I do not wish your mind to be encumbered with issues that do not belong there. I think of nothing else to give you, gentlemen. If I do, after you have retired, and after counsel have notified me of the exceptions that they have to my instructions, I may recall you, to give you additional instructions, but I think of none now.

The form of verdict here, as prepared by the clerk, is this: After the title of the cause, it proceeds as follows: We, the jury in the above cause, find the defendants Fred W. Garrett—then and there is left a blank for you to insert either guilty or not guilty, as you find. And we find the defendant Dennis O'Rourke—there is another blank to insert guilty or not guilty, as you find, and so on through with all the defendants who are on trial here. Their names are inserted, and after the name is the place for you to insert your finding, and you will infer from that you are not bound to find all guilty or all not guilty. You find according to your judgment. If you find one man not guilty, you will so enter it; if you find another guilty, you will so enter it, and so on through. I may add, it requires a concurrence of all your number to furnish a verdict; that is, that 12 must agree.

After you have carefully considered this case and

reached your conclusion, and filled up those blanks as indicated here by the form of the verdict, the foreman you will select will sign this verdict, and you will bring it into court. The same officers who have had charge will continue in charge.

Now, at this time, bailiffs are sworn to take charge of the jury.

The COURT.—Gentlemen, whatever exceptions you desire to reserve may be noted after the jury retires, and made as if made before, and if I desire to further instruct the jury I can recall them.

Now, at this time, the jury retires under the charge of sworn bailiffs.

Mr. McNAMEE.—If the Court please, we desire to save an exception to the failure of the Court to give instructions as asked by the defendants, numbered one, three—

The COURT.—There is one instruction I forgot to give, and that is concerning the miners' union. I will recall the jury for that. I forgot that. I have it marked here, but forgot it.

Now, at this time, the jury is returned into court.

The COURT.—Gentlemen, I had one instruction that I had intended to give you, upon my own motion, but I overlooked my notes, and instead of giving mine, as I had intended, I shall give you one requested by the defendant, as your No. 3 (referring to Mr. McNamee).

Mr. McNAMEE.—Yes, sir.

The COURT.—That is concerning the miners' union being interested and engaged in this, and I give you this instruction:

"You are instructed that the organizations referred to in the evidence in this case as miners' unions are presumed to be lawful organizations—that is, organizations for lawful purposes, and you are to be governed by such presumption unless the evidence in the case convinces you, beyond a reasonable doubt, that they were formed for illegal or unlawful purposes. It does not necessarily follow that if some of the members of an organization for lawful purposes conspired and agreed to willfully and maliciously carry out unlawful objects, that all the members of the organization are guilty of the conspiracy. The only theory upon which all the members of the organization could be held as conspirators would be, that the objects of the organization were to willfully and maliciously carry out such unlawful objects, and that they knowingly connected themselves therewith, or remained with such organization after its unlawful objects were known to them. It might be that an organization had objects that were entirely lawful, and some members go outside of the lawful objects and combine willfully and maliciously to pursue an object unlawful; in such a case, only the persons so combining would be conspirators."

Now, I give you that, gentlemen, because something has been said about the miners' union here. It amounts simply to this, that we have no evidence here that the miners' unions are organized for an unlawful purpose, and, of course, until that was shown, all the members of the organization cannot be held for a conspiracy. Of course, if it appeared here that they were organized for an unlawful purpose, then each member of the union could be held; but it does not appear. Only those members of

the organization can be held who are shown by the evidence to have taken a part in it. So you will bear that in mind. It is not the organization, as an organization, can be held—simply the members who may have been shown by the evidence to have taken part or become members of the conspiracy. Now, with that suggestion, you may retire.

(Jury retires.)

Mr. McNAMEE.—If the Court please, we desire an exception to the failure of the Court to give all the instructions asked by the defendant, save and except numbers 2 and 3, and we desire—

The COURT.—2 and 3 are given, and also No. 10 is in effect given. I did not give it in your language, but I gave the substance.

Mr. McNAMEE.—Well, we will ask an exception to the giving of the instruction 10, as modified by the Court, and we also desire to save an exception to the entire charge of the Court, as given to the jury, and to each and every part thereof.

(Court adjourns.)

Morning Session, November 5,1899.

Now, at this time, the jury returns into court, with the verdict; which said verdict is filed with the clerk, and is thereupon read by the clerk, and the jury, being polled and all answering that it is their verdict, the defendants, by counsel, then take an exception to said verdict.

[Endorsed]: No. 410. Judge Beatty's charge to the jury in the dynamite case tried at Moscow, Idaho, October Term, 1899. Filed Nov. 5, 1899. A. L. Richardson, Clerk.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown.

Defendants.

Instructions Requested by Defendants.

The defendants in this action pray the Court to give the following instructions to the jury:

I.

The first count in the indictment charges the defendants named therein, together with others, did, on the 29th

day of April, A. D. 1899, at the county of Shoshone, State of Idaho, unlawfully, wickedly, and maliciously confederate and conspire together to commit an offense against the United States; that is to say, to unlawfully, willfully, maliciously, and knowingly obstruct and retard the movement and passage of a certain railway car and train over the lines and tracks of the Northern Pacific Railway Company, then carrying said United States mail, and that, to effect the object of the said conspiracy, the defendants, with others, on the 29th day of April, A. D. 1899, at said county of Shoshone, did then and there unlawfully, forcibly, maliciously, and knowingly delay, arrest, obstruct, and retard the movement and passage of said railway car and train over the lines and tracks of the Northern Pacific Railway Company, *by* the said Northern Pacific Railway Company being then and there engaged in the business of a common carrier of the mails of the United States, which said railway car and train were then and there carrying and transporting the mails of the United States, by then and there willfully, knowingly, maliciously, and forcibly arresting, delaying, stopping, obstructing, and backing said mail-car and train, as aforesaid.

The other two counts contained in the indictment have been dismissed.

Said first count is drawn under section 5,440 of the Revised Statutes of the United States, which reads as follows:

"Section 5,440. If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner, or for any pur-

pose, and one or more of such parties committing any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc.

This is the definition of the conspiracy alleged in said first count.

You will observe that it is alleged in the first count of the indictment that the object of the conspiracy was to knowingly and willfully obstruct and retard the passage of the United States mail over the lines and tracks described therein. That is an offense against the United States, and is defined in section 3,995 of the Revised Statutes of the United States, which reads as follows:

"Section 3,995. Any person who shall knowingly and willfully obstruct and retard the passage of the mail, or any carriage, horse, or driver, or carrier carrying the same, shall for every such offense be punishable," etc.

But the offense described in section 3,995 of the Revised Statutes is not the offense for which the defendants are on trial.

The defendants are being tried for the offense of conspiring to commit that crime. The offense, you perceive, consists in two or more persons conspiring to commit the crime described in the first count, namely: to obstruct and retard the passage of the United States mail. Merely agreeing, combining, and confederating together to effect the object of the conspiracy is sufficient to constitute the offense if any one of the parties took a step toward its execution.

The act set forth in the indictment, to wit, obstructing and retarding the passage of the United States mail, is no part of the offense charged. The purpose of the law

is, that a mere crime, however corrupt, shall not be punished as a crime unless it has led to some overt act.

II.

The burden of proof is upon the prosecution in this case to prove beyond a reasonable doubt:

First.—That a conspiracy, or, in other words, an agreement, was entered into between two or more of the defendants to commit an offense against the United States; that is to say, to willfully and knowingly obstruct and retard the passage of the United States mail, as alleged in said first count.

Second.—In addition, it must be proved, beyond a reasonable doubt, that one or more of said defendants committed some act to effect the object of the conspiracy.

Third.—The prosecution must prove, beyond a reasonable doubt, that the defendants, or two or more of them, did agree, combine, and conspire to willfully and knowingly obstruct and retard the United States mail, as alleged in said first count.

The alleged conspiracy may be proved by circumstantial evidence, if it be strong enough to convince the minds of the jury, beyond all reasonable doubt, that such conspiracy was formed.

The burden of proof is upon the prosecution to prove, beyond a reasonable doubt, that the defendants were parties to said conspiracy.

III.

You are instructed that the organizations referred to in the evidence in this case as "miners' unions" are presumed to be lawful organizations; that is to say, organiza-

tions for lawful purposes, and you are to be governed by such presumption unless the evidence in the case convinces you, beyond a reasonable doubt, that they were formed for illegal or unlawful purposes.

It does not necessarily follow that if some of the members of an organization for lawful purposes conspired and agreed to willfully and maliciously carry out unlawful objects that all of the members of the organization are guilty of conspiracy. The only theory upon which all the members could be held as conspirators would be that the objects of the organization were willfully and maliciously carry out such unlawful objects, and that they knowingly connected themselves therewith, or remained with such organization after its unlawful objects were known to them. It might be that an organization had objects which were entirely lawful, and some of the members go outside of the lawful objects and combine to willfully and maliciously pursue an unlawful object. In such a case, only the persons so combining would be conspirators.

IV.

If the defendants, or any of them, belonged to such organization or association for lawful purposes, and that some of the members, as individuals, or combined with others, independent of the organization, to willfully and maliciously carry out the unlawful purpose as set forth in the indictment, but that such organization as a whole, or these defendants as individuals, did not join or participate in such combination, then such defendant or defendants cannot be held responsible for the acts of such combination or of such individuals.

V.

If you find that the defendants, or any of them, did not combine to obstruct or retard the passage of the United States mail, as set forth in said first count, then such defendants should be acquitted.

VI.

The offense charged in said first count, to wit, obstruct and retard the passage of the mail as therein set forth, is an offense exclusively against the United States, and cognizable only in the federal courts. It is not an offense against the State of Idaho.

The stopping of railroad trains and railroad cars is an offense against the State of Idaho, and not an offense against the United States.

VII.

The evil intent in committing the offense against the State of Idaho is not sufficient to constitute the offense charged in this indictment. To constitute the offense set forth in said indictment, the specific intent to violate the laws of the United States and to commit the crime of willfully and knowingly obstructing and retarding the United States mails, as set forth in said count, must be found to have existed in the minds of the defendants in order to justify a conviction.

VIII.

The meaning of the words "knowingly" and "willfully" is defined as follows:

"Doing or omitting to do a thing knowingly or willfully implies, not only a knowledge of the thing, but a

determination with a bad intent to do it or omit doing it," and to constitute the crime set forth in said first count, it must be proved, beyond a reasonable doubt, that the act of obstructing or retarding the passage of the mail was done knowingly and willfully by the defendants; that is to say, that they intended to do it.

IX.

If you find from the evidence that a conspiracy was formed by a number of persons for the purpose and with the intent to commit a crime against the State of Idaho, and that incidentally the United States mail was obstructed or retarded by said conspirators, but without any knowledge and without any intention on the part of said conspirators to obstruct or retard the mail, such acts would not constitute an offense against the United States.

X.

The mere fact of the presence of the defendants, or any of them, at the time set forth in the said count, is not alone sufficient to prove that they, or any of them, were members of the conspiracy or joined criminally with the conspirators, or cast on him the burden of proving his innocence.

XI.

In order to make one an aider and abetter of conspirators, it is necessary that he should do or say something showing his consent to the felonious purpose and contributing to its execution.

XII.

You are instructed that it makes no difference in this case whether the United States mails were obstructed or retarded. The offense in this case consists in the unlawful agreement or conspiracy to obstruct or retard. If there was no agreement or conspiracy to obstruct, then the defendants are not guilty of the crime charged and you should acquit them.

Obstructing and retarding the passage of the United States mail is a distinct and independent offense from that of conspiring to obstruct and retard.

PATRICK REDDY.
CLAY McNAMEE.
PETER BREEN.

[Endorsed]: No. 410. United States District Court, District of Idaho. The United States vs. Louis Salla et al. Instructions requested by defendants. Filed Nov. 4th, 1899. A. L. Richardson, Clerk.

In the District Court of the United States, for the District of Idaho.

THE UNITED STATES
vs.
LOUIS SALLA and Others.

Verdict.

We, the jury in the above-entitled cause, find the defendant Fred. W. Garrett, not guilty; and we find the defendant Dennis O'Rourke, guilty; and we find the

defendant C. R. Burris, guilty; and we find the defendant Edward Albinola, guilty; and we find the defendant Louis Salla, guilty; and we find the defendant Henry Maroni, guilty; and we find the defendant W. V. Bundren, not guilty; and we find the defendant, Fred E. Shaw, not guilty; and we find the defendant John Luchinette, guilty; and we find the defendant Arthur Wallace, guilty; and we find the defendant P. F. O'Donnell, guilty; and we find the defendant Mike Malvey, guilty; and we find the defendant Francis Butler, guilty, as charged in the indictment.

ELIAS TUCKEY,
Foreman.

[Endorsed]: No. 410. United States District Court, District of Idaho. The United States vs. Louis Salla and others. Verdict. Filed Nov. 5, 1899. A. L. Richardson, Clerk.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs.

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown.

Defendants.

Motion for New Trial.

Now come the defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Mike Malvey, H. Maroni, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, and C. R. Burris, for themselves, and each of them, move this Honorable Court for a new trial in this action on the following grounds, to wit:

1. That the jury was guilty of misconduct, by which a fair and due consideration of the case was prevented.

2. That the Court misdirected the jury on matters of law.

3. That the Court has erred in the decision of questions of law arising during the course of the trial.

4. That the verdict is contrary to law and the evidence in the case.

PATRICK REDDY,
CLAY McNAMEE,
PETER BREEN,

Attorneys for Defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Mike Malvey, H. Maroni, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, and C. R. Burris.

[Endorsed]: No. 410. District Court of the United States, District of Idaho. The United States of America, vs. Louis Salla et al., defendants. Motion for new trial. Filed Nov. 6th, 1899. A. L. Richardson, Clerk. Patrick Reddy, Clay McNamee and Peter Breen, Attys. for Defts.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Motion in Arrest of Judgment.

Now come the defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Mike Malvey, H. Maroni, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, and C. R. Burris, for themselves, and each of them, move this Honorable Court that no judgment be rendered on

the verdict against the defendants herein upon the ground:

First.—That the first count of said indictment charges the defendants, with others, with the commission of a felony, to wit, a conspiracy to obstruct and retard the passage of the United States mail in violation of section 5440 of the Revised Statutes of the United States; and the second count charges the defendants, with others, with the commission of a misdemeanor, to wit, willfully and knowingly obstructing and retarding the passage of the mails of the United States in violation of section 3995 of the Revised Statutes of the United States.

That the third count also charges the defendants, with others, with the commission of a misdemeanor, to wit, willfully and knowingly obstructing and retarding the passage of the mails of the United States in violation of section 3995 of the Revised Statutes of the United States.

Second.—That the first count charges the defendants with the commission of a felony, and the second count charges the defendants with the commission of a misdemeanor, and the third count charges the defendants with the commission of a misdemeanor, and, therefore, a count for felony and one for misdemeanor are joined in the indictment.

That the said several counts are not for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transac-

tions of the same class of crimes or offenses which may be properly joined.

Third.—That the indictment does not show that the counts refer to the same act or transaction, or to two or more acts or transactions connected together or to two or more acts or transactions of the same class of crimes or offenses which may be properly jointed.

Fourth.—That the offense alleged in the first count and the offense alleged in the other two counts contained in the indictment are separate and distinct offenses, and in nowise related to each other; different penalties are prescribed by law, and the challenges to the jurors on the first count are different from those allowed on the second count and the third count, and a different procedure is required in the trial of the causes.

Fifth.—On the ground that the facts stated in said first count do not constitute a public offense.

That said count is insufficient in this: that it does not appear upon the face of said count in said indictment that the said Northern Pacific Railway Company was authorized by law or by the United States to carry the mail of the United States in said car or over the lines or tracks described in said count on the 29th day of April, 1899, or at any other time, or that said Northern Pacific Railway Company was ever authorized by law, or by the United States, or otherwise, to carry said United States mails over said lines or tracks, or elsewhere, or that said

United States mail was ever delivered to said Northern Pacific Railway Company for carriage from any one place to another or from any one postoffice to another.

Sixth.—That the facts stated in the said second count do not constitute a public offense.

That said count is insufficient in this: that it does not appear upon the face of said count in said indictment that the said Northern Pacific Railway Company was authorized by law, or by the United States, to carry the mail of the United States in said car or over the lines or tracks described in said count on the 29th day of April, 1899, or at any other time, or that said Northern Pacific Railway Company was ever authorized by law, or by the United States, or otherwise, to carry the said United States mails over said lines or tracks, or elsewhere, or that said United States mail was ever delivered to said Northern Pacific Railway Company for carriage from any one place to another or from any one postoffice to another.

Seventh.—That the facts stated in said third count do not constitute a public offense.

That said count is insufficient in this: that it does not appear upon the face of said count in said indictment that the said Oregon Railway and Navigation Company was authorized by law or by the United States to carry the mail of the United States in said car or over the lines or tracks described in said count, on the 29th day of April, 1899, or at any other time, or that said Oregon Railway

and Navigation Company was ever authorized by law, or by the United States, or otherwise, to carry said United States mails over said lines or tracks, or elsewhere, or that said United States mail was ever delivered to said Oregon Railway and Navigation Company for carriage from any one place to another or from any one postoffice to another.

PATRICK REDDY,
CLAY McNAMEE,
PETER BREEN,

Attorneys for Defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Mike Malvey, H. Maroni, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, and C. R. Burris.

[Endorsed]: District Court of the United States, District of Idaho. The United States of America, vs. Louis Salla et al., defendants. Motion in arrest of judgment. Filed Nov. 6th, 1899. A. L. Richardson, Clerk. Patrick Reddy, Clay McNamee, and Peter Breen, Attys. for Defts.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Affidavit of A. J. Headrick.

State of Idaho, } ss.
County of Latah. }

A. J. Headrick, being first duly sworn, deposes and says that he is a citizen of the United States and of Latah county, State of Idaho; that he resides in the city of

Moscow, and that he is acquainted with one B. K. Gordon, who acted and sat as a trial juror in the trial of the above-named defendants in the above-entitled action.

Affiant further states that he is a member of the grand jury which returned the indictment into court upon which the defendants were found guilty; that some time in the month of May, 1899, in Moscow, Idaho, on the corner of Main and Third streets, near J. W. Blackers' saloon, he heard the said B. K. Gordon make the statement that the man who participated in any and all of the alleged crimes and transactions which took place on the 29th of April, 1899, in Shoshone county, Idaho, were guilty, and should be convicted and punished for said crimes and transactions.

And affiant further states that he has no interest whatever in this case save and except that justice may be done in the premises.

A. J. HEADRICK.

Subscribed and sworn to before me this 6th day of November, A. D. 1899.

W. L. PAYNE,
Notary Public.

[Endorsed]: Original No. 410. U. S. District Court, District of Idaho. The United States vs. Louis Salla et al. Filed Nov. 6th, 1899. A. L. Richardson, Clerk.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Affidavit of James Hamilton.

State of Idaho, }
County of Latah. } ss.

James Hamilton, being first duly sworn, deposes and says that he is a citizen of the United States and State of Idaho; that he resides in the city of Moscow, Idaho;

that he is acquainted with one B. K. Gordon, who acted and sat as a trial juror in the trial of the above-named defendants in the above-entitled action; that on or about the month of May, 1899, he heard the said B. K. Gordon, in a conversation which took place in Moscow, Idaho, at the corner of Main and Third streets, near Berg's saloon, state that all of the men who took part in any of the transactions or crimes alleged to have been committed in Shoshone county, Idaho, on the 29th day of April, 1899, were guilty; that "they ought to be shot or hung," or words to that effect, and that "the people ought to rise and go to Shoshone county and clean out the entire gang," or words to that effect.

Affiant further states that he has no interest in this case save and except that justice be done in the premises.

JAMES HAMILTON.

Subscribed and sworn to before me this 6th day of November, A. D. 1899.

W. L. PAYNE,
Notary Public.

[Endorsed]: Original No. 410. Affidavit James Hamilton. U. S. District Court, District of Idaho. The United States vs. Louis Salla et al. Filed Nov. 6th, 1899. A. L. Richardson, Clerk.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

LOUIS SALLA et al.,
Defendants.

Affidavit of Clay McNamee.

State of Idaho,
County of Latah. } ss.

Clay McNamee, being duly sworn, on oath says that he is a citizen of the United States and of the State of Idaho; that he is one of the attorneys, and was at all times during the trial of said action one of the attorneys for the said defendants; that Patrick Reddy and Peter Breen were also attorneys for the defendants during the trial of said action; that on the afternoon of the 5th day of November, 1899, the said above-named attorneys were for the first time made acquainted with the matters and things contained in the affidavits of A. J. Headrick, Frank Rosebaum and James Hamilton, filed in the above-enti-

tled court in support of a motion for a new trial herein, that at no time until after the verdict in the above-entitled action had been rendered did the affiant or the said Patrick Reddy or Peter Breen become apprised of the matters and things contained in said affidavits.

CLAY McNAMEE.

Subscribed and sworn to before me this 6th day of November, A. D. 1899.

A. L. RICHARDSON,
Clerk.

[Endorsed]: Original No. 410. U. S. District Court, District of Idaho. The United States vs. Louis Salla et al. Filed Nov. 6th, 1899. A. L. Richardson, Clerk.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Affidavit of Frank Rosebaum.

State of Idaho, }
County of Latah. } ss.

Frank Rosebaum, being first duly sworn, deposes and says that he is a citizen of the United States and of the State of Idaho; that he resides in the city of Moscow,

Idaho; that he is acquainted with one B. K. Gordon, who acted as one of the trial jurors in the trial of the above-named defendants in the above-entitled action; that some time in the month of May, 1899, in a conversation in front of Layman & Curtis's news store in Moscow, Idaho, he heard the said B. K. Gordon make the statement that the men who committed the alleged crimes in Shoshone county, Idaho, on April 29th, 1899, were all members of the miners' unions, and that if they could not work themselves that they were not in favor of letting anyone else work; that they were guilty of the alleged crimes committed in Shoshone county on the 29th of April, 1899, and that they ought to be convicted and punished for said crimes; and affiant further states that on two or three other and different occasions he heard the said B. K. Gordon, during the summer of 1899, and prior to the trial of this action, express himself in the presence of others to the same effect as above stated.

Affiant further states that he has no interest whatever in this case save and except that justice may be done in the premises. FRANK ROSEBAUM.

Subscribed and sworn to before me this 6th day of November, A. D. 1899.

CHAS. W. SHIELDS,
Notary Public.

[Endorsed]: Original No. 410. U. S. District Court, District of Idaho. The United States vs. Louis Salla et al. Filed Nov. 6th, 1899. A. L. Richardson, Clerk.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Affidavit of D. K. Gordon.

State of Idaho, }
County of Latah. } ss.

D. K. Gordon, being first duly sworn, deposes and says that he was one of the jurors in the above-entitled case; that he has read the affidavits of A. J. Headrick, Frank Rosenbaum, and James Hamilton, now on file in said

case, wherein said Headrick, Rosebaum, and Hamilton allege that said affiant, in conversation held in Moscow, Idaho, during the month of May, 1899, and at various other times, made statements to the effect that the men who committed the alleged crimes in Shoshone county, Idaho, on the 29th day of April, 1899, were guilty and should be punished.

Said affiant states the facts to be, that neither at Moscow, Idaho, during the month of May, 1899, or at any other times, or at all, did he make any statements to the effect that the defendants in the above-entitled action were guilty of the crime for which they were tried.

Said affiant was summoned by the United States marshal as a special juror in said case, in response to the issue of an open venire by said court on the 27th day of October, 1899; that at the time of being summoned as a juror as aforesaid said affiant did not know that said defendants had been indicted in said court; that he had no acquaintance with said defendants, or any of them; that he did not know any of them either by sight or by name, and that he had neither formed nor expressed any opinion as to their guilt or innocence.

Said affiant did not know during the month of May, 1899, nor during the following summer, that said defendants had been indicted in said court, or that any charge had been made against them.

Said affiant did not know, at any of the times mentioned, that said defendants, or any of them, had been arrested or had been charged with the commission of the crimes set out in the indictment in said court.

D. K. GORDON.

Subscribed and sworn to before me this 6th day of November, 1899.

A. L. RICHARDSON,
Clerk.
By M. Cozier,
Deputy.

[Endorsed]: No. 419. U. S. District Court, District of Idaho. The United States vs. Louis Salla et al. Affidavit of D. K. Gordon. Filed Nov. 6th, 1899. A. L. Richardson, Clerk.

JOURNAL ENTRIES.

At a stated term of the District Court of the United States for the District of Idaho, held at Moscow, Idaho, October Term, 1899. Present. Hon. JAS. H. BEATTY, Judge.

Wednesday, October 25th, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al.
} No. 410.

Conspiracy.
Delaying and Obstructing the U. S. Mails.

Order Requiring Defendants to Plead to Indictment.

On this day the defendants, Frank W. Garrett, Dennis O'Rourke, C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, W. V. Bundren, Fred. E. Shaw, John Luchinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey,

and Francis Butler, were brought into court in person, and appearing by Patrick Reddy and Clay McNamee, Esqs., to be arraigned upon the true bill of indictment heretofore presented against them by the grand jury. The said defendants each being asked by the Court if he was indicted under his true name, answered in the affirmative, except the defendants indicted under the name of Charley Garrett, answered that his true name is Frank W. Garrett, and the defendant indicted under the name of William Bundren stated his true name to be W. V. Bundren, and the defendant indicted under the name of A. Wallace stated his true name to be Arthur Wallace, and the defendant indicted under the name of Fred. Shaw stated his true name to be Fred. E. Shaw. Ordered that said defendants be proceeded against under their true names.

The formal reading of the indictment was waived, and defendants furnished with true copies thereof by order of Court at the expense of the United States. Ordered that said defendants plead to said indictment at the opening of court on to-morrow, the 26th inst.

Thursday, October 26th, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al.
} No. 410.

Conspiracy.
Delaying and Obstructing
the U. S. Mails.

Order and Pleas.

Now came the defendants, by their attorneys, and moved the Court to quash the indictment herein, and after argument by said attorneys for the same and by the United States attorney against said motion, the Court ordered that said motion be, and the same is hereby, denied. To which ruling the said defendants, by their counsel, then and there excepted in due form of law. Thereupon the said defendants, by their said counsel, filed their general demurrer and special demurrer to said indictment, and upon consideration the Court ordered that said demurrers be, and the same are hereby, overruled. To which ruling the defendants, by their counsel, then and there excepted in due form of law. Said defendants, by their said attorneys, here filed their motion to require the plaintiff to elect upon which count in the indictment he would proceed to trial, and upon consideration the Court ordered that said motion be and the same is hereby denied. To which ruling the defendants,

by their counsel, then and there excepted in due form of law. Said defendants, by their said attorneys, here filed their motion to require the plaintiff to elect upon which count in the indictment he would proceed to trial, and upon consideration the Court ordered that said motion be and the same is hereby denied. To which ruling the defendants, by their said counsel, then and there excepted in due form of law.

Now came the following named defendants in person, to wit: Frank W. Garrett, indicted under the name of Charles Garrett, Dennis O'Rourke, C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, W. V. Bundren, indicted under the name of William Bundren, Fred. E. Shaw, indicted under the name of Fred. Shaw, John Luchinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey, and Francis Butler. The Court asked each and all of said defendants for their plea, and they each pleaded separately for himself that he is not guilty of the offense charged in the indictment. The Court here adjourned the further hearing of said cause until to-morrow, the 27th inst.

Friday, October 27th, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al.
} No. 410.

Conspiracy.
Delaying and Obstructing
the U. S. Mails.

Trial, etc.

Now came the defendants Fred. W. Garrett, Dennis O'Rourke, C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, W. V. Bundren, Fred. E. Shaw, John Luchinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey, and Francis Butler by their attorneys, and, upon the separate affidavits of the defendants filed herein, moved the Court to have subpoenas issued and witnesses summoned for the defense at the expense of the United States, said affidavits stating the materiality of the evidence and their inability to pay the expenses of the same, and moved for a subpoena duces tecum for H. M. Davenport to produce the testimony taken before the coroner's inquest upon the bodies of James Cheyne and John Smith, which motion was opposed by the United States attorney on behalf of plaintiff, and J. H. Forney, Esq., on behalf of the State of Idaho, and after argument the Court ordered that said motion be denied as to the subpoena duces tecum for W. H. Davenport, and sustained the motion in part to the effect that twenty witnesses be summoned on behalf of defendants at the expense of the United States. To the ruling of the Court in denying the

motion for a subpoena duces tecum, and denying the motion in part for witnesses for each defendant, the said defendants, by their counsel, then and there excepted in due form of law. The said defendants selected the following named persons, twenty in number, and subpoena was issued for said persons as directed at the expense of the United States, to wit: Mrs. Pauline Caro, Kellogg, Dr. Matchette, Wardner, Mike Carter, Wardner, Jack Keating, Wardner, Miss Emma Butler, Wardner, Jack Simpkins, Wallace, Katie O'Rourke, Wardner, H. L. Day, Wardner, W. H. Lee, Burke, Frank Witmer, Wallace, Chas. Russell, Kellogg, Joe Gerardi, Kellogg, Ed. Flannigan, Mullan, Joseph Jones, Kellogg, Peter Orlandini, Kellogg, Mrs. W. V. Bundren, Wardner, Mrs. Dave Fennesston, Kellogg, Robbie Wilson, Kellogg, Mrs. Fred. Shaw, Kellogg, Joseph Tilley, Wallace.

J. L. Rivers was here sworn as reporter in said cause, and, the said defendants stating they were ready for trial, said cause came regularly on to be heard and tried before the Court and jury as to the defendants Fred. W. Garrett, Dennis O'Rourke, C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, W. V. Bundren, Fred. E. Shaw, John Luchinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey, and Francis Butler. R. V. Cozier, United States attorney, and M. A. Folsom, Esq., appearing as counsel for plaintiff, and Patrick Reddy, Clay McNamee, and Peter Breen, Esqs., on behalf of the defendants, the said above-named defendants, thirteen in number, being in court in person. The clerk, under direction of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, to serve as a jury in said

cause. The following named persons drawn from the box and sworn on voir dire were excused for cause, to wit: Wm. N. Buchanan, W. C. Mallory, Ramsey Walker, S. R. H. McGowan, and Geo. Campbell. The following named persons were excused on peremptory challenge by counsel for plaintiff, to wit, F. S. Cantril and L. D. Arnold. The following named persons were excused on peremptory challenge by counsel for defendants, to wit: Saml. L. Thompson and S. A. Anderson, and the venire here becoming exhausted, the Court ordered that a venire issue to the marshal to summon six persons from the bystanders to appear forthwith to serve as jurors, which was done accordingly and said venire returned, whereupon the clerk placed the names so returned in the jury box, written on separate slips of paper and folded, and proceeded to fill the panel. John Mayee, a person drawn from the box and sworn, was excused on peremptory challenge by counsel for plaintiff. Albert Dygert, a person drawn from the box and sworn, was excused on peremptory challenge by counsel for defendants. The defendants, by their counsel, here moved the Court for leave to exercise a fourth peremptory challenge, which motion was denied, and to which ruling the defendants by their counsel then and there excepted. The following are the names of the persons drawn from the box, sworn on voir dire, passed upon, accepted by counsel for the respective parties, and sworn by the clerk to well and truly try said cause, and a true verdict render therein, according to the law and evidence, to wit: Fred Mitling, A. M. Struble, John Oylear, Wm. Parkins, Geo. A. Smith, Hans C. F. Tweedt, Jesse

Coverdale, Chas. E. Sandberg, Wm. Freytag, Wm. J. Mervyn, Elias Tuckey, and D. K. Gordon.

The clerk, under the direction of the Court, read the indictment to the jury, and stated the plea of the defendants on trial hereinbefore named.

Here the Court placed said jury in charge of sworn bailiffs of the court, with directions not to allow them to separate nor speak to anyone concerning the case, and to produce them in court on to-morrow, and adjourned the further hearing of said cause until to-morrow, the 28th inst., at 10 o'clock A. M.

Saturday, October 28th, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al.
} No. 410.

Conspiracy.
Delaying and Obstructing the U. S. Mails.

Trial (Continued).

Now came the defendants, by their attorneys of record, and moved the Court for a subpoena duces tecum to issue to S. H. Hays, attorney general of Idaho, W. E. Borah, and Jas. H. Hawley, to produce the shorthand notes taken at the coroner's inquest on the bodies of James Cheyne and John Smith, which motion was opposed by J. H. Forney, Esq., on behalf of the State of Idaho, and R. V. Cozier, United States attorney, and after argument and upon consideration the Court ordered that

said motion be denied. To which ruling the defendants by their counsel then and there excepted in due form of law.

Thereupon the trial of said cause adjourned on yesterday for further hearing was resumed. Jury called and found to be present, the defendants on trial were called and answered to their names, and the respective counsel being in court. R. V. Cozier, United States attorney, made his opening statements to the Court and jury, and called the following-named persons, who were sworn, examined, and cross-examined as witnesses on behalf of plaintiff, to wit, John Clark, Thomas Ames, Albert Burch, Walter Taylor, I. T. Rouse, W. B. Sutherland, F. R. Culbertson, Joseph McDonald, and Rem Smith, after which the Court admonished the jury, placed them in charge of sworn officers of the court, and adjourned the further hearing of said cause until Monday, the 30th inst., at 10 o'clock A. M.

Monday, October 30th, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al.
} No. 410.

Conspiracy.
Delaying and Obstructing the U. S. Mails.

Trial (Continued).

The trial of this cause adjourned on the 28th inst. for further hearing was this day resumed. Jury called and found to be present, the thirteen defendants on trial were

called and answered to their names, and the respective counsel of record being in court.

The following named persons were sworn, examined, and cross-examined as witnesses on behalf of plaintiff, to wit, Emil Anderson, John Anderson, Fred Funk, Miss E. F. Bent, Albert Massing, Joseph Phifer, A. M. St. Clair, Jos. Riddell, Mrs. Rem Smith, J. Bloom, G. A. Olmstead, Thomas Chester, L. W. Hutton, A. W. Perley, Robert Jell, George Marshal, Katie McLaughlin, Hattie Simons, Gus Smith, W. H. Pipes, James Pipes, Mrs. Tubbs and Ed Booth, after which the Court admonished the jury, placed them in charge of sworn officers of the court, and adjourned the further hearing of said cause until to-morrow, the 31st inst., at 10 o'clock A. M.

Tuesday, October 31st, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al. } No. 410.

Conspiracy.
Delaying and Obstructing the U. S. Mails.

Trial (Continued).

The trial of this cause adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present, the respective attorneys of record being in court, and the defendants on trial having been called and answered to their names.

The following named persons were sworn, examined, and cross-examined as witnesses on behalf of plaintiff,

to wit: James M. Porter, Joseph Kendall, Mrs. McMirtrey, A. S. Crawford, Miss Sophia Moffit, M. J. Sinclair, G. A. Olmstead recalled, L. W. Hutton recalled, Martin Jasper, Maggie Skinner, Mrs. Emma Skinner, Mrs. Mary Doty, W. A. Doherty, Albert Swinerton, John C. Boyd, and J. H. Forney, and during the examination of the latter named in chief, the Court admonished the jury, placed them in charge of sworn officers of the court, and adjourned the further hearing of said cause until to-morrow, the 1st day of November, 1899, at 10 o'clock A. M.

Wednesday, November 1st, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al.
} No. 410.

Conspiracy.
Delaying and Obstructing the U. S. Mails.

Trial (Continued).

The trial of this cause adjourned on yesterday was this day resumed. Jury called and found to be present, the respective attorneys of record and the defendants on trial being in court, the said defendants having been called and answered to their names.

The following named persons were called, sworn, and examined as witnesses on behalf of plaintiff, to wit, J. H. Forney, continued, Ed Booth, recalled, Mrs. Burke, J. H. Martin, and Thomas Wright.

Here the plaintiff rest with the privilege of reopening the case and taking further testimony on to-morrow. Patrick Reddy, Esq., opened the case to the Court and jury on behalf of defendants, and called the following named persons, who were sworn, examined, and cross-examined as witnesses on behalf of defendants, to wit, P. J. Keegan, John S. Earles, Ervin Edwards, A. H. Lee, Ed. J. Flannigan, Jo. Gerrard, Miss P. R. Carrolo, Dr. F. P. Machett, Peter Orlandini, and Joseph Jones, after which the Court admonished the jury, placed them in charge of sworn officers of the court, and adjourned the further hearing of said cause until to-morrow, the 2d inst., at 10 o'clock A. M.

Thursday, November 2d, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al.
} No. 410.

Conspiracy.
Delaying and Obstructing the U. S. Mails.

Trial (Continued).

The trial of this cause adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present, the respective attorneys of record and the defendants on trial being in court, the said defendants having been called and answered to their names. James Jessup was sworn and examined as a witness on behalf of plaintiff. The following named

persons were sworn, examined, and cross-examined as witnesses on behalf of defendants, to wit, Peter Orlandini, recalled, Frank Wirmire, Herman Cook, Charles Russell, John Donnely, Mrs. W. V. Bundren, Thos. Heeney, Mrs. Mary Funnerton, Mrs. Philip O'Rourke, Miss Kate O'Rourke, Mike Carter, John Keating, Mrs. Ed. Butler, Wm. Shafer, Mrs. Mary Doty, recalled, Mrs. Mary D. Kearney, Miss Jesse Kearney, J. W. Chapman, and J. H. Forney, and the defense rest here with permission to have other witnesses sworn and examined on their behalf at another time. Maggie Skinner and Mrs. Sophia Moffitt were recalled, and examined in rebuttal, after which the Court admonished the jury, placed them in charge of sworn officers of the court, and adjourned the further hearing of said cause until to-morrow, the 3d inst.

Friday, November 3d, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al.
} No. 410.

Conspiracy.
Delaying and Obstructing
the U. S. Mails.

Order Dismissing Second and Third Counts in Indictment.

The trial of this cause adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present, the respective attorneys of record and

the defendants on trial being in court, the said defendants having been called and found to be present. William Boyle, Mrs. Chas. Russell, and Samuel McDonald were sworn, examined and cross-examined as witnesses on behalf of defendants. Mrs. Jane F. Van Gilder and J. B. Pipes were sworn and examined in rebuttal, and the evidence and testimony closed. Here, on motion of the United States district attorney, ordered that the second and third counts in the indictment in this cause be, and the same are hereby, dismissed.

The Court and jury were addressed by M. A. Folsom, Esq., on behalf of the United States, followed by Peter Breen and Clay McNamee, Esqs., on behalf of the defendants, after which the Court admonished the jury, placed them in charge of sworn officers of the court, and adjourned the further hearing of said cause until to-morrow, the 4th inst.

Saturday, November 4th, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al.
} No. 410.

Conspiracy and
Delaying and Obstructing
the U. S. Mails.

Trial (Continued).

The trial of this cause adjourned on yesterday for further hearing was this day resumed, jury called and found

to be present, the respective attorneys of record and the defendants on trial being in court, the said defendants having been called and answered to their names. The arguments on behalf of defendants was closed by Patrick Reddy, Esq., R. V. Cozier, United States attorney, then closed the argument on behalf of plaintiff, and said jury, after being instructed by the Court, retired to their room to consider their verdict in charge of sworn officer of the court.

Sunday, November 5, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al.
} No. 410.

Conspiracy.
Delaying and Obstructing
the U. S. Mails.

Trial (Concluded).

Now came the jury all called and found to be present, the respective attorneys of record and the thirteen defendants on trial being in court. Being asked if they had agreed upon a verdict, they, through their foreman, stated that they had, and presented their written verdict in the words following, to wit:

In the District Court of the United States, for the District of Idaho.

THE UNITED STATES,
vs.
LOUIS SALLA and Others.

Verdict.

We, the jury in the above-entitled cause, find the defendant Fred W. Garrett not guilty, and we find the defendant Dennis O'Rourke guilty, and we find the defendant C. R. Burris guilty, and we find the defendant Edward Albinola guilty, and we find the defendant Louis Salla guilty, and we find the defendant Henry Maroni guilty, and we find the defendant W. V. Bundren not guilty, and we find the defendant Fred E. Shaw not guilty, and we find the defendant John Luchinette guilty, and we find the defendant Arthur Wallace guilty, and we find the defendant P. F. O'Donnell guilty, and we find the defendant Mike Malvey guilty, and we find the defendant Francis Butler guilty, as charged in the indictment.

ELIAS TUCKER,
Foreman.

Which verdict was recorded by the clerk and read to the jury, who confirmed the same; at the request of defendants' attorneys, said jury was polled, and each juror answered separately for himself that the above is his verdict. Thereupon the Court discharged said jury from

the further consideration of said cause, and ordered that the defendants Fred W. Garrett, W. V. Bundren, and Fred E. Shaw be discharged from custody, and remanded the remaining defendants to the custody of the marshal.

Monday, November 6th, 1899.

THE UNITED STATES
vs.
LOUIS SALLA et al.
} No. 410.

Conspiracy and
Delaying and Obstructing
the U. S. Mails.

Order Denying Motion for New Trial.

Now came the United States attorney with the defendants Dennis O'Rourke, C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, John Luchinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey, and Francis Butler, and their attorneys, Peter Breen and Clay McNamee, Esqrs.; thereupon the said defendants by their said attorneys moved the Court for a new trial herein, filing in support thereof the affidavits of Clay McNamee, James Hamilton, A. J. Headrick, and Frank Rosenbaum, which motion was by the Court denied, to which ruling the said defendants by their counsel then and there excepted. The United States attorney was given leave to file counter affidavits upon said motion hereafter. The said defendants

by their said counsel then moved the Court to postpone sentence herein for a period of twenty-four hours, which motion was by the Court denied, to which ruling the defendants by their counsel then and there excepted. Thereupon the said defendants by their said counsel moved the Court in arrest of judgment, which motion was by the Court denied, to which ruling the said defendants by their said counsel then and there excepted.

THE UNITED STATES

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCHINETTE, DENNIS O'ROURKE, FRED E. SHAW, indicted under the name of FRED SHAW, PAT ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, FRED W. GARRETT, indicted under the name of CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURKE, ALEX. WILLS, PAUL CORCORAN, W. V. BUNDREN, indicted under the name of WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT GERARD, C. R. BURRIS, and Others whose True Names are to the Grand Jurors Unknown.

Violation Secs. 3995 and 5440, R. S., U. S.

Judgment.

Now, on this 6th day of November, 1899, the United States district attorney, with the defendants Dennis O'Rourke, C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, John Luchinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey and Francis Butler, and their counsel, Peter Breen and Clay McNamee, came into court, the defendants were duly informed by the Court of the nature of the indictment found against them for the crime of conspiracy committed on the 29th day of April, A. D. 1899, of their arraignment and plea of "Not guilty as charged in the indictment," of their trial, and the verdict of the jury on the 5th day of November, A. D. 1899, "Guilty as charged in the indictment."

The defendants were then asked by the Court if they had any legal cause to show why judgment should not be pronounced against them, to which they each replied that he had none, and no sufficient cause being shown or appearing to the Court;

Now, therefore, the said defendants having been convicted of the crime of conspiracy, it is hereby considered and adjudged that the defendants C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, John Luchinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey, and Francis Butler do each pay a fine of $1,000, and that they stand committed until said fine is paid.

And that they each be imprisoned and kept in the California state's prison at San Quentin, California, for the term of twenty-two months.

And it is ordered and adjudged that the defendant

Dennis O'Rourke do pay a fine of $1,000, and that he stand committed until said fine is paid.

And that he be imprisoned and kept in the California state's prison at San Quentin, California, for the term of twenty months; and it is further ordered and adjudged that the said defendants be and are hereby remanded to the custody of the United States marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof.

On motion of the attorneys for the said defendants, it is ordered that the said defendants have sixty days from this date in which to prepare, file, and serve their bill of exceptions on motion for a new trial herein.

[Endorsed]: In the District Court of the United States, for the District of Idaho, Northern Division. Judgment Roll No. 410. The United States vs. Louis Salla et al. Register No. 1. Filed November 5th, 1899. A. L. Richardson, Clerk.

In the District Court of the United States for the District of Idaho.

UNITED STATES
vs.
LOUIS SALLA et al.

Order Extending Time to File Bill of Exceptions.

It satisfactorily appearing to me that there is good cause therefor, it is hereby ordered that the time heretofore given said defendants to prepare, file, and serve their

bill of exceptions, or statement to be used on motion for a new trial herein, is hereby extended for the period of thirty days from and after January 6th, 1900.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 410. In the United States District Court for the District of Idaho. United States vs. Louis Salla et al. Order extending time to file bill of exceptions. Filed December 16, 1899. A. L. Richardson, Clerk.

In the District Court of the United States of America, for the District of Idaho, Northern Division.

UNITED STATES
Plaintiff,
vs.
LOUIS SALLA et al.,
Defendants.

Order Extending Time to File Bill of Exceptions.

Upon good cause being shown therefor it is hereby ordered by me, the Judge of said court, that the defendants be allowed five days from and after the 6th day of February, 1900, in which to prepare, file, and serve their bill of exceptions on motion for a new trial herein.

Dated January 25th, 1900.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 2,110. U. S. District Court, District of Idaho. The United States vs. Louis Salla et al. Order extending time to file bill of exceptions. Filed Jan. 25th, 1900. A. L. Richardson, Clerk.

In the District Court of the United States for the District of Idaho, Northern Division.

THE UNITED STATES,
Plaintiff.

vs.

LOUIS SALLA et al.,
Defendants.

Order Extending Time to File Amendments to Bill of Exceptions.

It appearing to the Court that R. V. Cozier, Esq., United States district attorney for the district of Idaho, has been subpoenaed as a witness in a matter before a committee of the house of representatives of the United States, at Washington, D. C., and that the date of his return is uncertain;

It is hereby ordered that the time for plaintiff to file amendments to defendants' bill of exceptions in the above-entitled cause be, and the same is hereby, extended until the further order of this court.

Dated this 15th day of February, A. D. 1900.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 210. U. S. District Court, District of Idaho. The United States vs. Louis Salla et al. Order extending time for plaintiff to file amendments to defendants' bill of exceptions. Filed Feb. 15th, 1900. A. L. Richardson, Clerk.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Defendants' Proposed Bill of Exceptions.

Be it remembered, that the above-entitled action came on regularly for trial before said district court and a jury impaneled to try the same. The United States district attorney, R. V. Cozier, and M. A. Folsom, Esq., repre-

sented the prosecution, and P. Reddy, Esq., Peter Breen, Esq., and Clay McNamee, Esq., represented the defendants.

Be it further remembered, that at the proper time, and before the jury were impaneled, the defendants filed and made a motion to quash the indictment filed herein, which motion is in the words and figures following, to wit:

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs.

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Motion to Quash the Indictment.

Now come Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Fred Shaw, Mike Malvey, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, Ed.

Albinola, William Bundren, and C. R. Burris, defendants named in the above-entitled action, and for themselves, and each of them, move to quash the indictment in this action, filed in this court on the 25th day of October, A. D. 1899, upon the following grounds, to wit:

That there is a misjoinder of counts in said indictment in this:

I.

That the first count of said indictment charges the defendants with others with the commission of a felony, to wit, a conspiracy to obstruct and retard the passage of United States mail, in violation of section 5440 of the Revised Statutes of the United States; and the second count charges the defendants with others with the commission of a misdemeanor, to wit, willfully and knowingly obstructing and retarding the passage of the mails of the United States, in violation of section 3995 of the Revised Statutes of the United States.

That the third count also charges the defendants, with others, with the commission of a misdemeanor, to wit, willfully and knowingly obstructing and retarding the passage of the mails of the United States, in violation of section 3995 of the Revised Statutes of the United States.

II.

That the first count charges the defendants with the commission of a felony, and the second count charges the defendants with the commission of a misdemeanor, and the third count charges the defendants with the commission of a misdemeanor, and therefore, a count for felony and one for misdemeanor are joined in the indictment.

That the said several counts are not for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined.

III.

That the indictment does not show that the counts refer to the same act or transaction, or to two or more acts or transactions connected together, or to two or more acts or transactions of the same class of crimes or offenses which may be properly joined.

IV.

That the offense alleged in the first count, and the offenses alleged in the other two counts contained in the indictment. are separate and distinct offenses and in no wise related to each other; different penalties are prescribed by law and the challenges to the jurors on the first count are different from those allowed on the second count and third count, and a different procedure is required in the trial of the causes.

CLAY McNAMEE,
PATRICK REDDY,
Attorneys for Defendants.

[Endorsed]: Motion to quash indictment. Filed Oct. 26, 1899.

Thereupon the Court overruled and denied said motion, to which ruling the defendants then and there duly excepted.

Whereupon defendants filed and made the following motion:

In the District Court of the United States, within and for the District of Idaho.

October Term, A. D. 1899.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Defendants' Motion to Elect.

Now come the defendants Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Fred Shaw, Mike Malvey, H. Maroni Charley Garrett, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, William Bundren, and C. R. Burris, and move the court for an order requiring the United States attorney, R. V. Cozier, Esq., to elect as to whether

he will proceed to try the defendants on the first count in said indictment, or whether he will proceed to try the defendants on the second or third count, or both counts, contained in said indictment.

CLAY McNAMEE,
PATRICK REDDY,
Attorneys for Defendants.

Which motion was by the Court overruled and denied, to which ruling defendants then and there duly excepted, and now assign said ruling as error No. ——.

Be it further remembered, that in the course of the proceedings for the selection of the jury to try said action, and after defendants had exercised three peremptory challenges, counsel for defendants asked leave to exercise a fourth peremptory challenge on behalf of defendants, on the ground that said defendants were entitled to ten peremptory challenges, which request was by said district court denied, to which ruling said defendants then and there duly excepted.

Be it further remembered, that after a jury had been empaneled and sworn to try the case, the following proceedings were had and testimony taken:

At the proper time, each of the defendants herein filed with the clerk and presented to the court an affidavit and motion, of which the following are true copies:

In the District Court of the United States, within and for the District of Idaho.

October Term, A. D. 1899.

THE UNITED STATES OF AMERICA, Plaintiffs.
vs.
LOUIS SALLA et al., Defendants.
Affidavit for Witnesses.

Affidavit of Dennis O'Rourke.

United States of America,
State of Idaho,
County of Latah. } ss.

Dennis O'Rourke, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the testimony of Mrs. Phillip O'Rourke, Miss Katie O'Rourke, Jack Simpkins, and High McElvaney is material to his defense in the above-entitled action; that he cannot safely go to trial without them; that they are residents and within the district of Idaho; that all of said witnesses reside at Wardner, Shoshone county, Idaho; that he expects to prove by Mrs. Phillip O'Rourke, Miss Katie O'Rourke, Jack Simpkins, and High McElvaney that he was at his home on the day of the blowing up of the mill, the 29th day of April, 1899; that he was not on or near the train or trains mentioned in the indictment, and took no part in obstructing or delaying, or in anywise in-

terfering with, the mail or mail train or mail cars described in the indictment; and that at the time of the arrival of said trains he was at his home in Wardner, Shoshone county, Idaho.

Affiant further states that the testimony of H. M. Davenport, clerk of the District Court of the First Judicial District within and for the county of Shoshone County, Idaho, is material to his defense in the above-entitled action; that he cannot safely go to trial without such witness; that the testimony taken before the coroner, Hugh France, of Shoshone county, Idaho, upon the inquest held upon the body of James Cheyne and John Smith, has been filed with the clerk of the District Court of Shoshone county; that the said testimony of H. M. Davenport is important and material to identify the testimony thus taken; that, at the time the said testimony was filed with said clerk, the District Court ordered that said package containing said testimony should be sealed and no one permitted to open it without an order of the Court; that said package was by the said H. M. Davenport, clerk of said District Court, sealed up so as to conceal the contents of said package and said testimony, and so as to prevent the defendants, or any of them, or their attorneys or counselors, from inspecting or copying said testimony, and the said county clerk refuses to give a certified copy or permit the defendants, or any of them, or their attorneys or their counselor, an opportunity to examine the same to take a copy thereof; that said testimony is material to the defendant and each of them upon the trial, in order to cross-examine several of the witnesses who appeared before the grand jury which found

the indictment in this action, and who are expected to be witnesses on the trial of this case, in order to contradict and impeach said witnesses as to the testimony given before the grand jury against this affiant and his codefendants; that the testimony is desired and required, and is material, to contradict and impeach the testimony of the following-named persons whose names are endorsed on the indictment herein as witnesses, who were called and testified before the grand jury and against the affiant, to-wit: J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joe Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, Joe Kendall.

Affiant further states that he is not possessed of sufficient means and is actually unable to pay the fees of any of said witnesses.

Wherefore, affiant prays the Court to order a subpoena to be issued and served upon Mrs. Philip O'Rourke, Miss Katie O'Rourke, Jack Simpkins, and Hugh McElvaney, and for an order that a subpoena duces tecum be issued for H. M. Davenport, requiring him to bring with him and produce in this court the package or packages containing the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joe Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, Jos. Kendall, and also a duly certified copy of the order of the court above referred to, requiring the package to be sealed and not to allow any person to open it or ascertain its contents.

DENNIS O'ROURKE.

Subscribed and sworn to before me this 26th day of October, A. D. 1899.

A. L. RICHARDSON,
Clerk.

Filed October 26th, 1899.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA, Plaintiffs,
vs.
LOUIS SALLA et al., Defendants.
} Affidavit for Witnesses.

Affidavit of Ed. Albinola.

United States of America,
State of Idaho,
County of Latah.
} ss.

Ed. Albinola, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the testimony of Frank Witmier, and a blacksmith named Walter ———, who is employed at Mrs. Oscar Mason's blacksmith shop in the town of Wardner, who name is to affiant unknown, is material to his defense in the above-entitled action; and he cannot safely go to trial without them; that they are residents and within the district of Idaho; that both of said witnesses reside at Wardner, Shoshone county, Idaho.

That said Frank Witmeir will testify that affiant was working at the Lombardi Mine during the whole of the forenoon of the 29th of April, 1899, and could not have been on or near the train or trains mentioned in the indictment, and could not have taken any part in the obstruction or delaying, or in anywise interfering with, the mail or mail trains or mail-cars mentioned in the indictment.

That said Walter ———, who was and is employed at the blacksmith shop of Mrs. Oscar Mason, will testify that affiant was not on or near the train or trains mentioned in the indictment on the 29th day of April, 1899, and took no part in obstructing or delaying, or in anywise interfering with, the mail or mail train or mail-cars described in the indictment, and at the time of the arrival of said train he was at the town of Wardner, Shoshone county, Idaho.

Affiant further states that the testimony of H. M. Davenport is material to his defense in the above-entitled action; that said H. M. Davenport is the county clerk of Shoshone county; that testimony taken before Dr. Hugh France, coroner of Shoshone county, Idaho, upon the inquest held upon the body of James Cheyne and on the body of John Smith, has been filed with the clerk of the District Court of Shoshone county; that the said testimony of H. M. Davenport is important and material to identify the testimony thus taken; that at the time the said testimony was filed with the said clerk, the District Court ordered that said package containing said testimony should be sealed and no one permitted to open it without an order of the Court; that said package was by

the said H. M. Davenport, clerk of said District Court, sealed up so as to conceal the contents of said package and said testimony, and so as to prevent defendants or any of them or their attorneys or counselors from inspecting or copying said testimony, and the said county clerk refuses to give a certified copy or permit the defendants or any of them, or their attorneys or their counselors, an opportunity to examine the same to take a copy thereof; that said testimony is material to the defendants, and each of them, upon the trial, in order to cross-examine several of the witnesses who appeared before the grand jury which found the indictment in this case, in order to contradict and impeach said witnesses as to the testimony given before the grand jury against this affiant and his codefendants.

That the testimony is desired and required and is material to contradict and impeach the testimony of the following-named persons whose names are indorsed on the indictment herein as witnesses, who were called and testified before the grand jury and against the affiant, to wit: J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, Jos. Kendall. Affiant further states that he is not possessed of sufficient means and is actually unable to pay the fees of any of said witnesses.

Wherefore, affiant prays the Court to order a subpoena issued and served upon Frank Witmier and Walter ——, and for an order that a subpoena duces tecum be issued for H. M. Davenport, requiring him to bring with him and produce in this court the package or packages containing

the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, and Jos. Kendall, and also a duly certified copy of the order of the court above referred to, requiring the package to be sealed, and not allow any person to open it or ascertain its contents.

ED. ALBINOLA.

Subscribed and sworn to before me this 27th day of October, A. D. 1899.

A. L. RICHARDSON,
Clerk.
By M. Cozier,
Deputy.

Filed October 27th, 1899.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA, Plaintiffs,
vs.
LOUIS SALLA et al., Defendants.
} Affidavit for Witnesses.

Affidavit of M. Malvey.

United States of America,
State of Idaho,
County of Latah.
} ss.

M. Malvey, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled ac-

tion; that the testimony of W. H. Lee is material to his defense in the above-entitled action; that he cannot safely go to trial without such witness; that said Lee is a resident of and within the district of Idaho; that said W. H. Lee is a resident of the town of Wardner, Idaho.

That said W. H. Lee will testify as to this affiant's whereabouts on the 29th day of April, 1899; that he was not on or near the train or trains mentioned in the indictment, and took no part in obstructing or delaying or in anywise interfering with the mail or mail train or mail-cars described in the indictment.

Affiant further states that the testimony of H. M. Davenport is material to his defense in the above-entitled action; that said H. M. Davenport is the county clerk of Shoshone county; that testimony taken before Dr. Hugh France, coroner of Shoshone county, Idaho, upon the inquest held upon the body of James Cheyne and on the body of John Schmidt has been filed with the clerk of the District Court of Shoshone county; that said testimony of H. M. Davenport is important and material to identify the testimony thus taken; that at the time the said testimony was filed with the said clerk, the District Court ordered that said package containing said testimony should be sealed, and no one permitted to open it without an order of the Court; that said package was by the said H. M. Davenport, clerk of the said District Court, sealed up so as to conceal the contents of said package and said testimony, and so as to prevent defendants, or any of them, or their attorney or counselors, from inspecting or copying said testimony, and the said county clerk refuses to give a certified copy or permit the defendants

or any of them, or their attorneys or their counselors, an opportunity to examine the same to take a copy thereof; that said testimony is material to the defendants, and each of them, upon the trial, in order to cross-examine several of the witnesses who appeared before the grand jury which found the indictment in this case, in order to contradict and impeach said witnesses as to their testimony given before the grand jury against this affiant and his codefendants.

That the testimony is desired and required and is material to contradict and impeach the testimony of the following-named persons whose names are endorsed on the indictment here as witnesses, who were called and testified before the grand jury and against affiant, to wit: J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, and Jos. Kendall.

Affiant further states that he is not possessed of sufficient means and is actually unable to pay the fees of any of said witnesses.

Wherefore, affiant prays the Court to order a subpoena to be issued and served on W. H. Lee; and for an order that a subpoena duces tecum be issued for H. M. Davenport, requiring him to bring with him and produce in this court the package or packages containing the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Ed. Booth, Jos. Kendall, and also a duly-certified copy of the order of the court above referred to, required the package to be sealed and not to allow any person to open it or ascertain its contents.

MIKE MALVEY.

Subscribed and sworn to before me this 27th day of October, A. D. 1899.

A. L. RICHARDSON,
Clerk.
By M. Cozier,
Deputy.

Filed October 27th, 1899.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA, Plaintiffs.
vs.
LOUIS SALLA et al., Defendants.
} Affidavit for Witnesses.

Affidavit of C. R. Burris.

United States of America,
State of Idaho,
County of Latah.
} ss.

C. R. Burris, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the testimony of Dr. Davis, Mike Carter, Dick Tonner, John Tonner, Jack Keating, and John Murphy is material to his defense in the above-entitled action; that he cannot safely go to trial without them; that they are residents and within the district of Idaho; that all of said witnesses reside at Wardner, Shoshone county, Idaho;

that Dr. Davis, Mike Carter, Dick Tonner, John Tonner, Mike McGowan, Jack Keating, and John Murphy will testify that they saw this defendant at Carter's saloon in the town of Wardner, Idaho, on the 29th day of April, 1899, and during all of said day; that he was not on or near the train or trains mentioned in the indictment, and took no part in obstructing or delaying, or in anywise interfering with, the mail or mail train or mail-cars described in the indictment, and that at the time of the arrival of said trains he was at the town of Wardner in Carter's saloon.

Affiant further states that the testimony of H. M. Davenport is material to his defense in the above-entitled action; that said H. M. Davenport is the county clerk of Shoshone county; that said testimony taken before Dr. Hugh France, coroner of Shoshone county, Idaho, upon the inquest held upon the body of James Cheyne and on the body of John Smith, has been filed with the clerk of the District Court of Shoshone county; that the testimony of H. M. Davenport is important and material to identify the testimony thus taken; that at the time the said testimony was filed with the said clerk the District Court ordered said package containing said testimony should be sealed, and on one permitted to open it without an order of the Court; that said package was by the said H. M. Davenport, clerk of the District Court, sealed up so as to conceal the contents of said package and said testimony, and so as to prevent defendants, or any of them, or their attorneys or counselors, from inspecting or copying said testimony, and the said county clerk refuses to give a certified copy or permit the defendants, or any of

them, or their attorneys or counselors, an opportunity to examine the same to take a copy thereof; that said testimony is material to the defendants and to each of them upon the trial in order to cross-examine several of the witnesses who appeared before the grand jury which found the indictment in this action, and who are expected to be witnesses on the trial of this case, in order to contradict and impeach said witnesses as to the testimony given before the grand jury against this affiant and his codefendants.

That the testimony is desired and required, and is material to contradict and impeach the testimony of the following-named persons whose names are endorsed on the indictment here as witnesses who were called and testified before the grand jury and against the affiant, to wit: J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, and Jos. Kendall.

Affiant further states that he is not possessed of sufficient means and is actually unable to pay the fees of any of the said witnesses.

Wherefore affiant prays the court to order a subpoena to be issued and served upon Dr. Davis, Mike Carter, Dick Tonner, John Tonner, Jack Keating, and John Murphy, and for an order that a subpoena duces tecum be issued for H. M. Davenport, requiring him to bring with him and produce in this court the package or packages containing the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, Jos. Kendall, and also a duly-certified copy of the order of the Court above referred to re-

quiring the package to be sealed and not to allow any person to open it or ascertain its contents.

C. R. BURRIS.

Subscribed and sworn to before me this 27th day of October, A. D. 1899.

A. L. RICHARDSON,
Clerk.
By M. Cozier,
Deputy.

Filed October 27th, 1899.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA, Plaintiffs, vs. LOUIS SALLA et al., Defendants.	}	Affidavit for Witnesses.

Affidavit of Henry Maroni.

United States of America,
State of Idaho, } ss.
County of Latah.

Henry Maroni, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the testimony of Mrs. C. R. Caro, Miss Pauline Caro, Dominic Geovanini, Louis Mulli, Mrs.

O'Berto, and Dr. ——— Machete, is material to his defense in the above-entitled action; that he cannot safely go to trial without them; that they are residents and within the district of Idaho; that all of said witnesses reside at Wardner, Shoshone county, Idaho; that he expects to prove by Mrs. C. R. Caro and Miss Pauline Caro that affiant was home all day and sick in bed on the 29th day of April, 1899; that he was not on or near the train or trains mentioned in the indictment and took no part in obstructing or delaying or in anywise interfering with the mail or mail train or mail-cars described in the indictment; that Dominic Geovanini, Louis Mulli, and Mrs. ——— O'Berto will testify that they called at the residence of Mrs. C. R. Caro and saw him sick in bed on said 29th day of April, 1899; that he expects to prove by Dr. ——— Machete that the said Dr. Machete called on him on the morning of May 4th, 1899, as physician, affiant having not recovered from his sickness at said time.

Affiant further states that the testimony of H. M. Davenport is material to his defense in the above-entitled action; that said H. M. Davenport is the county clerk of Shoshone county; that testimony taken before Dr. Hugh France, coroner of Shoshone county, Idaho, upon the inquest held upon the body of James Cheyne and on the body of John Smith has been filed with the clerk of the District Court of Shoshone county; that the said testimony of H. M. Davenport is important and material to identify the testimony thus taken; that at the time the said testimony was filed with the said clerk, the District Court ordered that said package containing said testimony should be sealed and no one permitted to open it without

an order of the Court; that said package was by the said H. M. Davenport, clerk of said District Court, sealed up so as to prevent the defendants, or any of them, or their attorneys or counselors, from inspecting or copying said testimony, and the said county clerk refuses to give a certified copy or permit the defendants, or any of them, or their attorneys or their counselors, an opportunity to examine the same or to take a copy thereof; that said testimony is material to the defendant and each of them, upon the trial, in order to cross-examine several of the witnesses who appeared before the grand jury which found the indictment in this action, and who are expected to be witnesses on the trial of this case, in order to contradict and impeach said witness as to the testimony given before the grand jury against this affiant and his codefendants.

That the testimony is desired and required and is material to contradict and impeach the testimony of the following named persons whose names are endorsed on the indictment herein as witnesses who were called and testified before the grand jury and against the affiant, to wit: J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, and Jos. Kendall.

Affiant further states that he is not possessed of sufficient means and is actually unable to pay the fees of any of said witnesses.

Wherefore, affiant prays the Court to order a subpoena to be issued and served upon Mrs. C. R. Caro, Miss Pauline Caro, Dominic Geovanini, Louis Mulli, Mrs. ——— O'Berto, and Dr. ——— Machete, and for an order

that a subpoena duces tecum be issued for H. M. Davenport requiring him to bring with him and produce in this court the package or packages containing the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth Jos. Kendall, and also a duly certified copy of the order of the Court above referred to, requiring the package to be sealed and not to allow any person to open it or ascertain its contents.

HENRY MARONI.

Subscribed and sworn to before me this 27th day of October, A. D. 1899.

A. L. RICHARDSON,
Clerk.
By M. Cozier,
Deputy.

Filed October 27th, 1899.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA, Plaintiffs. vs. LOUIS SALLA et al., Defendants.		Affidavit for Witnesses.

Affidavit of Francis Butler.

United States of America,
State of Idaho, } ss.
County of Latah.

Francis Butler, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the testimony of Mrs. Edw. Butler and Jack Shannon, and ——— Herbert is material to his defense in the above-entitled action; that he cannot safely go to trial without them; that they are residents and within the district of Idaho; that all of said witnesses reside at Wardner, Shoshone county, Idaho; that he expects to prove by Mrs. Edw. Butler that he was not masked on the 29th day of April, 1899; that he was not on or near the train or trains mentioned in the indictment; that he expects to prove by Jack Shannon that he was not masked on said date, carried no arms, and took no part whatever in interfering with the mail or mail train or mail cars described in the indictment; that ——— Herbert will testify that he had no arms on the 29th day of April, 1899, and took no part in obstructing or delaying, or in anywise interfering with, the mail or mail train or mailcars described in the indictment.

Affiant further states that the testimony of H. M. Davenport is material to his defense in the above-entitled action; that said H. M. Davenport is the county clerk of Shoshone county; that testimony taken before Dr. Hugh France, coroner of Shoshone county, Idaho, upon the inquest held upon the body of James Cheyne and on the body of John Smith, has been filed with the clerk of the District Court of Shoshone county; that the said testimony of H. M. Davenport is important and material to identify the testimony thus taken; that, at the time the said testimony was filed with the said clerk, the District Court ordered that said package containing said testi-

mony should be sealed, and no one permitted to open it without an order of the court; that said package was by the said H. M. Davenport, clerk of said District Court, sealed up so as to conceal the contents of said package and said testimony, and so as to prevent the defendants, or any of them, or their attorneys or counselors, from inspecting or copying said testimony, and the said county clerk refuses to give a certified copy, or permit the defendants, or any of them, or their attorneys or their counselors, an opportunity to examine the same or to take a copy thereof; that said testimony is material to the defendants and each of them upon the trial in order to cross-examine several of the witnesses who appeared before the grand jury which found the indictment in this action, and who are expected to be witnesses on the trial of this case, in order to contradict and impeach said witnesses as to the testimony given before the grand jury against this affiant and his codefendants.

That the testimony is desired and required, and is material, to contradict and impeach the testimony of the following named persons whose names are endorsed on the indictment herein as witnesses who were called and testified before the grand jury and against the affiant, to wit: J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. *Pfifer*, A. M. St. Clair, Jas B. Pipes, Ed. Booth, Jos. Kendall.

Affiant further states that he is not possessed of sufficient means and is actually unable to pay the fees of any of said witnesses.

Wherefore affiant prays the Court to order a subpoena to be issued and served upon Mrs. Edward Butler, Jack

Shannon, and ——— Herbert, and for an order that a subpoena duces tecum be issued for H. M. Davenport, requiring him to bring with him and produce in this court the package or packages containing the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. *Phifer*, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, Jos. Kendall, and also a duly-certified copy of the order of the Court above referred to, requiring the package to be sealed, and not to allow any person to open it or ascertain its contents.

FRANCIS BUTLER.

Subscribed and sworn to before me this 26th day of October, A. D. 1899.

A. L. RICHARDSON,
Clerk.

Filed October 26th, 1899.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA, Plaintiffs, vs. LOUIS SALLA et al., Defendants.	Affidavit for Witnesses.

Affidavit of P. F. O'Donnell.

United States of America,
State of Idaho, } ss.
County of Latah.

P. F. O'Donnell, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the testimony of Ed. Flannigan is material to his defense in the above-entitled action; that he cannot safely go to trial without such witness; that said witness is a resident and within the district of Idaho; that said witness resides at Mullan, Shoshone county, Idaho; that he expects to prove by Ed. Flannigan that affiant left Burke, Idaho, on the 19th day of March, 1899, and went to Gregson Springs, Montana, and did not return to Mullan, Shoshone county, Idaho, until the 3d day of May, A. D. 1899; that he was not on or near the train or trains mentioned in the indictment, and took no part in obstructing or delaying, or in anywise interfering with the mail or mail train, on the 29th day of April, 1899.

Affiant further states that the testimony of H. M. Davenport is material to his defense in the above-entitled action; that said H. M. Davenport is the county clerk of Shoshone county; that testimony taken before Dr. Hugh France, coroner of Shoshone county, Idaho, upon the inquest held upon the body of James Cheyne and on the body of John Smith, has been filed with the clerk of the District Court of Shoshone county; that the said testimony of H. M. Davenport is important and material to identify the testimony thus taken; that at the time the said testimony was filed with the said clerk the District Court ordered that said package containing said testimony should be sealed and no one permitted to open it without an order of the Court; that said package was by the said H. M. Davenport, clerk of said District Court,

sealed up so as to conceal the contents of said package and said testimony, and so as to prevent the defendants, or any of them or their attorneys or counselors, from inspecting or copying said testimony, and the said county clerk refuses to give a certified copy or permit the defendants, or any of them, or their attorneys or their counselors, an opportunity to examine the same to take a copy thereof; that said testimony is material to the defendant and each of them upon the trial in order to cross-examine several of the witnesses who appeared before the grand jury which found the indictment in this action and who expected to be witnesses on the trial of this case, in order to contradict and impeach said witnesses as to the testimony given before the grand jury against this affiant and his codefendants.

That the testimony is desired and required, and is material, to contradict and impeach the testimony of the following named persons, whose names are indorsed on the indictment herein as witnesses, who were called and testified before the grand jury and against the affiant, to wit: J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, Jos. Kendall.

Affiant further states that he is not possessed of sufficient means, and is actually unable to pay the fees of any of said witnesses.

Wherefore, affiant prays the Court to order a subpoena to be issued and served upon Mr. Ed. Flannigan, and for an order that a subpoena duces tecum be issued for H. M. Davenport, requiring him to bring with him and produce in this court the package or packages containing the tes-

timony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joe Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, Jos. Kendall, and also a duly certified copy of the order of the Court above referred to requiring the package to be sealed, and not to allow any person to open it or ascertain its contents.

P. F. O'DONNELL.

Subscribed and sworn to before me this 26th day of October, A. D. 1899.

A. L. RICHARDSON,
Clerk.

Filed October 26th, 1899.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA, Plaintiffs, vs. LOUIS SALLA et al., Defendants.	Affidavit for Witnesses.

Affidavit of John Lucinetti.

United States of America,
State of Idaho,
County of Latah. } ss.

John Lucinetti, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the testimony of C. A. Newell, Peter

Orlandini, and Joseph Jones, is material to his defense in the above-entitled action; that he cannot safely go to trial without them; that they are residents and within the district of Idaho; that C. A. Newell resides at Wallace, Idaho; that Peter Orlandini and Joseph Jones reside at Wardner, Idaho.

That he expects to prove by C. A. Newell that he was down to the O. R. & N. depot on the morning of the 29th of April, 1899, for the purpose of looking after a velocipede which said C. A. Newell had for sale for him; that he expects to prove by Peter Orlandini that he accompanied him from his residence north of the station up through the old road east of Kellogg to Wardner, while the train was coming in, and that he was not on or near the train or trains mentioned in the indictment, and took no part in obstructing or delaying the mail or mails of the United States described in the indictment; that he expects to prove by Joseph Jones that he was at his residence north of narrow-gauge track when the train came in, and that he took no part in obstructing or delaying the train or mail described in the indictment.

Affiant further states that the testimony of H. M. Davenport is material to his defense in the above-entitled action; that said H. M. Davenport is the county clerk of Shoshone county; that testimony taken before Dr. Hugh France, coroner of Shoshone county, Idaho, upon the inquest held upon the body of James Cheyne and on the body of John Smith, has been filed with the clerk of the District Court of Shoshone county; that the said testimony of H. M. Davenport is important and ma-

terial to identify the testimony thus taken; that at the time the said testimony was filed with the said clerk, the District Court ordered that said package containing said testimony should be sealed and no one permitted to open it without an order of the Court; that said package was by the said H. M. Davenport, clerk of said District Court, sealed up so as to prevent the defendants, or any of them, or their attorneys or counselors, from inspecting or copying said testimony, and the said county clerk refuses to give a certified copy or permit the defendants, or any of them, or their attorneys or their counselors, an opportunity to examine the same to take a copy thereof; that said testimony is material to the defendant, and each of them, upon the trial in order to cross-examine several of the witnesses who appeared before the grand jury which found the indictment in this case, in order to contradict and impeach said witnesses as to the testimony given before the grand jury against this affiant and his codefendants.

That the testimony is desired and required, and is material, to contradict and impeach the testimony of the following named persons, whose names are indorsed on the indictment herein as witnesses, who were called and testified before the grand jury and against the affiant, to wit: J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, and Jos. Kendall.

Affiant further states that he is not possessed of sufficient means, and is actually unable to pay the fees of any of said witnesses.

Wherefore, affiant prays the Court to order a subpoena to be issued and served upon C. A. Newell, Peter Orlandini, and Joseph Jones, and for an order that a subpoena duces tecum be issued for H. M. Davenport, requiring him to bring with him and produce in this court the package or packages containing the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joe Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, Jos. Kendall, and also a duly certified copy of the order of the Court above referred to, requiring the package to be sealed and not allow any person to open it or ascertain its contents.

JOHN LUCINETTI.

Subscribed and sworn to before me this 27th day of October, A. D. 1899.

A. L. RICHARDSON,
Clerk.
By M. Cozier,
Deputy.

Filed October 27th, 1899.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,	Plaintiffs.	Affidavit for Witnesses.
vs.		
LOUIS SALLA et al.,	Defendants.	

Affidavit of Louis Salla.

United States of America,
State of Idaho,
County of Latah. } ss.

Louis Salla, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the testimony of George Girardi, Agusto Pasardi, Serofino Orlandini, George Orlandini, and Peter Albinola is material to his defense in the above-entitled action; that he cannot safely go to trial without them; that they are resident and within the district of Idaho; that all of said witnesses are residents of Kellogg, Shoshone county, Idaho.

That George Girardi will testify that this defendant and said Girardi were playing pool in the saloon of Pete Albinola on the morning of April 29th, 1899, and quit

playing just before the arrival of the train, and that this affiant took no part in obstructing or delaying, or in anywise interefering with the mail or mail train or mail-cars mentioned in the indictment; that Agusto Pasardi, Serofino Orlandini, George Orlandini, and Peter Albinola will testify that they saw this affiant during the hours from 10 o'clock A. M. to 2 o'clock P. M. on the 29th day of April, 1899, and that this affiant took no part in obstructing or delaying, or in anywise interfering with, the mail or mail train or mail-cars described in the indictment.

Affiant further states that the testimony of H. M. Davenport is material to his defense in the above-entitled action; that said H. M. Davenport is the county clerk of Shoshone county; that testimony taken before Dr. Hugh France, coroner of Shoshone county, Idaho, upon the inquest held upon the body of James Cheyne and on the body of John Smith, has been filed with the clerk of the District Court of Shoshone county; that the said testimony of H. M. Davenport is important and material to identify the testimony thus taken; that at the time the said testimony was filed with the said clerk the District Court ordered that said package containing said testimony should be sealed and no one permitted to open it without an order of the Court; that said package was by the said H. M. Davenport, clerk of said District Court, sealed up so as to conceal the contents of said package and said testimony, and so as to prevent defendants, or any of them, or their attorneys or counselors, from inspecting or copying said testimony, and the said county

clerk refuses to give a certified copy or permit the defendants, or any of them, or their attorneys or their counselors, an opportunity to examine the same to take a copy thereof. That said testimony is material to the defendant, and each of them, upon the trial in order to cross-examine several of the witnesses who appeared before the grand jury which found the indictment in this action, and who are expected to be witnesses on the trial of this case, in order to contradict and impeach said witnesses as to the testimony given before the grand jury against this affiant and his codefendants.

That the testimony is desired and required, and is material, to contradict and impeach the testimony of the following named persons, whose names are indorsed on the indictment herein as witnesses, who were called and testified before the grand jury and against the affiant, to wit: J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, Jos. Kendall.

Affiant further states that he is not possessed of sufficient means and is actually unable to pay the fees of any of said witnesses.

Wherefore, affiant prays the Court to order a subpoena to be issued and served upon George Girardi, Agusto Pasardi, Serofino Orlandini, George Orlandini, and Peter Albinola, and for an order that a subpoena duces tecum be issued for H. M. Davenport, requiring him to bring with him and produce in this court the package or packages containing the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joe Phifer, A. M.

St. Clair, Jas. B. Pipes, Ed. Booth, Joe Kendall, and also a duly certified copy of the order of the Court above referred to requiring the package to be sealed and not to allow any person to open it or ascertain its contents.

LOUIS SALLA.

Subscribed and sworn to before me this 27th day of October, A. D. 1899. A. L. RICHARDSON, Clerk.

By M. Cozier, Deputy.

Filed October 27th, 1899.

***Affidavit of Arthur Wallace.**

The Court thereupon rendered its decision, limiting the number of witnesses, at the expense of the Government, for the defendants, to twenty, and refusing to issue a subpoena duces tecum directed to H. M. Davenport, directing him to appear in this court and bring with him said testimony taken at said coroner's inquest, to which rulings, and each of them, defendants then and there duly excepted.

Testimony of John Clark.

I am a miner working in the Standard Mine at the present time and reside close to Mace, where I have lived two years or more. I worked in the Standard Mine on the night of the 28th of April last. Am a member of the local miner's union at Burke. On the 29th of April I was recording secretary of that union. All the men

*These words are found in certified record, but the affidavit does not follow.

working in the Standard Mine are members of the union. There is a local union at Burke, at Gem, at Mullan, and at Wardner. These unions belong to the Western Federation of Miners. I did not attend a meeting of the Burke union on the morning of April 29th, last. I was in Burke that morning about eight o'clock, and saw a few men around the hall and also a few in the hall. I went into the hall. The men were standing around talking about waiting for the train coming up, when we were all going down to Wardner. That morning when we came off the night shift we was informed we were to go to Wardner to use moral suasion with the Bunker Hill and Sullivan Mining Company to get them to give their employees the raise of wages demanded and fix up everything in accordance. I did not get that information from a member of the union. I do not know how the information got to the mine, but I was told by the miners that the object in going to Wardner was to use moral suasion. There was no work on the Standard on the 29th of April. It worked the 28th and the night of the 28th and on the 30th. About eight o'clock on the morning of 29th of April I went up to Burke; stayed there a few minutes and returned to Mace; got ready and took the train and came down to Wardner. Took the train at Mace. I did not see any armed or masked men on the train at Burke or Mace. I got into a box-car. When the train stopped at Mace the box-car happened to be just in front of the platform—the door being right so a person could almost step into it, with a little exertion—and that being the easiest place, I jumped in there myself and the boys with me. It was a mixed train and had

a passenger-coach. I got into the box-car because it was the handiest, and the boys were getting in there. There was Andy Johnson, John Nigard, Victor Ladeen, Charlie Anderson, and I do not remember just how many others. There was quite a few got on there. I believe the first stop after leaving Mace was at Black Bear. Some more men got on there. I did not see any of them masked or armed and did not see them do anything before getting on the train. The next stop was some place close to the Frisco. I do not know what the train stopped there for of my own knowledge. The next stop was at Gem, where I believe I saw one man get into the box-car where I was with a mask. I did not look out much, and that is the only one I saw. I did not get out of the box-car going down until I got to Wardner. At Wardner I got out of the train; stopped there probably a few minutes, looking around, and immediately started off up town. I seen a number of men around there with masks on, and seen a gun or two. Did not see anything unusual any more than the crowd. I am acquainted with F. W. Garrett, commonly known as Charlie Garrett. I saw him that day up in Wardner. I do not know whether he is a member of the miners' union. I did not see him on that train. Garrett lived at Mace on the 29th of April, or about that time. He was a blacksmith working for the Standard Mining Company. I never had any conversation with Charlie Garrett as to his being down to Wardner that day, except that I talked to him in Wardner that day.

Cross-Examination.

Some time after the train arrived at Wardner I was walking up town and caught up with Mr. Garrett and some other man, as they were going up street. They were as much as three blocks away from the depot then. He was not armed or masked. The conversation we had was just relative to common topics. Nothing was said as to why he came to Wardner, or anything about that; we might have spoke about the trouble at the mill, what was going on down there. Nothing was said as to how he came to be on the train. I do not remember that he said he had been forced to get on the train by any parties. I could not say that he did not make that statement. I do not remember the conversation to amount to much. The reason no work was carried on in the Standard Mine on the 29th of April, 1899, was we were given to understand that they were going to make a change in the machinery. Had been given that understanding some three or four days prior which all the men knew—the mine was going to close down for twenty-four hours. Notice was given that it would be closed down and they did close down. The notice came from Archie McCullom; that is the manager, the foreman. He gave that notice to the employees that no work would be done on that day for the reason stated. I went with the balance of the crowd; I first started with the intention to come down to use moral suasion with the Bunker Hill and Sullivan. I also had some business to do in Wardner, and found it a good time to go down; had made up my mind, when I first heard the mine was going to

shut down, that I would go to Wardner that day. The understanding was that moral suasion was to be used. I believed that in good faith. I did not buy a ticket to go down. There was none sold at Mace. I paid my fare to the brakeman. I did not know that any guns were to be carried down there. I never engaged in or heard any conversation among the men who engaged in that matter about guns, powder, or anything of that kind. I was on the train when we went down to Gem. There was quite a stop made there. Nothing was taken on board the train but the passengers, as far as I know. I did not go outside the box-car. I do not know what was taken on. I did not look out. The powder-house at the Frisco is above Gem, about half a mile. I made no inquiry for the reason why the train was backed up there. I heard them speaking about taking powder out of the powder-house on the train at that time. I was informed by hearing others say so that they were taking powder from the powder-house and put on board this train. I did not consider that because we had a lot of dynamite that was any detriment to my going down to Wardner. It struck me at that time that might be more of a bluff than anything else. That is the first thing that struck me. I did not mask or have any arms at any time. I had none tendered me. I did not regard that as an act of the union. I was not required by the union to join in this affair or do anything. I know of no order from the union to myself or anyone else to join in that affair. I was not in attendance at any time when any resolution was passed to that effect. I know of no such resolution having been passed. It might have been passed

without coming to my knowledge. There was several meetings I was not there, and I never even looked over the minutes of the meeting when I was not there. I only attended one meeting or, maybe, two since I was elected. I testified before the coroner's jury, on the inquest over the bodies of Cheyne and Smith, and before the District Court of Shoshone county on the trial of Paul Corcoran. To the best of my recollection I did not state before the coroner's jury that I did not recognize anybody on that train from the time I left Burke until I reached Wardner. I did not state before the coroner's jury upon the inquest upon the body of James Cheyne and upon the body of John Smith that I did not recognize anyone on that occasion except Paul Corcoran, and that was when I was going home. I made no such statement, to the best of my recollection. I testified on the trial of Paul Corcoran in the District Court, in Shoshone county, that I had changed my mind, and that I was not positive that I recognized Paul Corcoran, but that I thought it was Paul Corcoran. I was a member of the miners' union and entered into an agreement to go down with that body of men on the train, and go to the Bunker Hill Company's works and by moral suasion endeavor to have them join the union. I intended to assist in that enterprise. I was put in the bull-pen at Wardner on the 6th or 7th of May of this year. I was let out under bonds after I had been in two weeks. During that two weeks I was taken before the coroner's jury, guarded by soldiers and a deputy sheriff, and under those circumstances I gave the testimony we have been speaking about. I was out not quite four weeks and I was rearrested again. I

had not been employed during the four weeks and did not look for employment during that time. I was then imprisoned again and placed in the guard-house of the bull-pen. I regard that as a great deal closer confinement than the bull-pen. I asked them several times to let me get in the bull-pen, that I would rather be in the bull-pen. I was confined the second time between seven and eight weeks. During that time I was not required to go before the coroner's jury. Subsequent to the occasion named I was called before the coroner's jury but once. When I came to testify in the Paul Corcoran case I was brought to Wallace. No one talked to me about the evidence I should give on the trial of Corcoran until after I got to Wallace. I know Mace Campbell. I have not had any conversation with anyone since the trial of the Corcoran case concerning my testimony. I went to Wardner with the intention of influencing the Bunker Hill and Sullivan Company's employees.

Redirect Examination.

After I got to Wardner and saw what was going on I desisted from any further participation in the events of that day. I paid my fare only as far as Wallace. I got aboard the Northern Pacific Company's train. Since my arrival here I have had no conversation with any officer of this court, or at any other time preceding this trial, in which such officer held out any inducement to me to testify. I have had no conversation with anyone connected with the defense in this case, wherein they held out any inducements or tried to get me not to testify, or to change my testimony. I am not testifying here un-

der any influence that moves my testimony so as to change it from the truth.

Recross Examination.

I have not been engaged in business since my release from the bull-pen. I have been employed at the Standard Mine. I was employed there on the 19th day of September. That is the same company I worked for before the riots of April 29th. I was employed by that company about a month after I had testified in the Corcoran case and my release from the bull-pen. I was let out of the bull-pen about a week after I gave my testimony in the Corcoran case, and have not been troubled since.

Testimony of Thomas Ames.

I am a miner by trade and live at Wardner, where I have resided for three years next March. I have been engaged in the business of mining, and have worked for the Bunker Hill and Last Chance mines. I am a member of the Wardner union, and was a member of that union on the 29th of April last. The Wardner union is a subordinate union under the Federation of the Northwestern Union. I cannot tell from what it gets its charter or derives its powers; I am not well enough posted. I was not working for the Bunker Hill and Sullivan Mining Company on the 29th of April last. I was discharged on the morning of the 23d because I belonged to the union. The company was in the habit of not employing union men. I belonged to the union—they found it out and let me go. I attended a meeting of the Wardner union on the 23d of April. They met at eight o'clock

and passed a resolution for a committee to call on Mr. Burbidge, to see if he would acknowledge the miners' union, and raise the wages, and they adjourned until two o'clock in the afternoon. The committee reported, and they passed a resolution to call on the mine in the evening at six o'clock, to solicit members. In the afternoon the committee to Mr. Burbidge reported to the union that he would accept a committee from the Bunker Hill but not from the miners' union. The meeting was closed then and we all went to the Bunker Hill in a body to get the men that was still working in the Bunker Hill to join the union. Mr. Boyle made a little talk and Mr. Burch made a little talk, and they got what members they could, and turned around and went back. Mr. Boyle was president of the union. Mr. Jerome Day was financial secretary, and Mr. Dennis O'Rourke was recording secretary. After soliciting these men to leave the mine we had a meeting and swore the members into the union. The next meeting of the union was Monday, at two o'clock in the afternoon. We simply passed a resolution to go to the mine again at night and solicit more members. I went with them. The solicited all the members they could, and then returned and went back to the mouth of the tunnel; met the men at the mouth to solicit them as they came out of the tunnel and then went back to the union hall. The next meeting was held that night. I did not attend and did not attend any other meeting after that. At one of the meetings I attended there was a report made that we could depend upon the men from up the creek for assistance. It was not mentioned for what assistance, only any assistance, I suppose, that the

lodge seen fit to call upon them for. It was not discussed as to what assistance would be needed, or for what purpose. Mr. Boyle gave it out in open meeting that they would come from up above. There was no discussion about it. Committees are appointed by the president of the union for all secret business, I suppose. Strikes are declared by every member of the union, by voting for them, and after that the members have nothing to do with it. I suppose the officers of the union had charge of it then. I do not know that the president does appoint these secret committees, but he is the only man that is supposed to appoint them. Under the rules of our order the members are expected to yield obedience to the officers. I was in Wardner on the 29th of April. I went to Page's Hotel and found out what I could, in the morning, what was going on. I didn't find anything much because no one seemed to know anything about it, only to go to the depot at 11 o'clock to meet a train. Two or three of the boys told me not to go down. The Bunker Hill and Sullivan Company was working the mine on the 29th. The Last Chance was not working. The members of the union were not at work that day. Mr. Watson and Mr. Wann notified me in the morning that there would be no work that day. I was not working; I was discharged. The same men notified me that morning that there would be a meeting of the Wardner union. There was no meeting. It was stated out on the street to us about the meeting, and they told me there was no meeting, to meet the train at 11 o'clock at the depot. They told me to take some digging clothes along with me, some overalls, some dirty clothes we used in the mines.

I did not know why these clothes were to be taken along. I suppose they were to disguise us. That statement was made that I was to disguise myself by a member of the union. It was to take some clothes along with us, so we could disguise ourselves. The same party informed me that the train was coming from above. They did not state who was coming on it. I heard statements that the "men from up the creek" was coming. Mr. Watson and Mr. Wann woke me up that morning. They told me there would be a meeting at the union hall. Chris. Eri told me to go down to the train with this disguise. He was a member of the union. He told me I had better not go down; to stay there in Wardner; that I was a marked man and had better stay on the street. My hand is crippled. I understood that is why he told me to stay up in Wardner. I saw persons going down the streets of Wardner with bundles that day. I do not know that they had arms. They were members of the Wardner union. I did not go to the station at all that day or to meet the train. I do not know what they were to do after they met this train. No one connected with the union told me what was to be done that day. Simply to take a bundle and go to the train. When the men went up to the mine to solicit members to join the union I heard a remark made that that would be the last time they would be given a chance to join the union. I heard no remarks that if they did not join another proposition would be made to them. I saw about fifty men going toward the train with bundles. They were to meet at the depot at 11 o'clock. The defendant O'Rourke was recording secretary of the Wardner miners' union. I think

I joined the union May 5, 1898. I took an oath when I joined the union. I could not relate it now. The substance was just to uphold one another, carry out the rules of the union as far as we was concerned. I believe I took an oath to keep secret whatever I learned through the union as a member. I do not think I have given anything away that hurts the union in any shape. I worked four months for the Last Chance. I was discharged from the Bunker Hill because I was a union man. I was not so informed. It has been their custom to discharge men as soon as it was discovered they were union men. That was sufficient for the discharge of any employee of the Bunker Hill and Sullivan prior to the 23d of April. I do not think that rule was changed after the 23d. I think that rule was established by the company. I knew that such was the rule. I worked there because I could get a job. Since the strike I have not concealed the fact that I was a union man. I worked for the Bunker Hill twenty-five months before the strike, and was let out because I was a union man, and on the 5th day of August, 1899, I went back to work for them again and am now working for the Bunker Hill Company. When I first went to work for the company I was not a union man. I joined after. I concealed that from the company for about twelve months. There probably 100 men discharged during the last two weeks I was in the employ of the Bunker Hill Company for that cause. They were let out four and five on a shift, and from that up to thirteen. Thirteen went out of the stope where I was. These men were discharged the last two weeks before the strike. Committees from the union

called on the manager of the mine to have him acknowledge the union and raise the wages. I mean by "acknowledge," not to show any discrimination between union men and nonunion men. He could not talk with the union men, but he would talk with a committee from the Bunker Hill Mine. My understanding is that being a union man was sufficient ground for refusing him employment, and refusing to speak to him. I was not a member of any committee who called on the management. I was present at one meeting when the committee reported that went to call on Mr. Burbidge. Their report was oral. I do not think there was but one committee called on Mr. Burbidge. Mr. Boyle appointed a committee to call upon Mr. Burbidge and see if he would acknowledge the union and raise the wages. The report was that he would not have anything to say to a committee from the miners' union, but would talk with a committee from the Bunker Hill. They asked for three dollars and a half all around. The rate of wages at that time was two and a half and three. The rate of wages in the camp at other places was three and a half all round, with the exception of the Last Chance Mine. Two and a half and three was paid there. I took no active part in the proceedings of the meetings which were held. I never made no statement. I was present at three meetings and consented to and voted for all that was done. I was not advised to take anything else than my working clothes on the morning of the 29th. I was to take them in a bundle. They said wrap up my digging clothes and come to the depot at 11 o'clock. Chris. Eri told me that first, and Mr. Watson and Mr. Wann came

there and told me to take my digging clothes and be at the depot. When they come and told me they told me to be over at the hall at 8 o'clock, and I saw them on the street before I went over there and saw Mr. Eri, and they told me to have my digging clothes and be at the depot at 11 o'clock. I did not understand why I was to put on my digging clothes; I supposed that something was going on; I was not advised to take any instruments with me for digging. I was not advised to put on my digging clothes, but to take them with me. I did not understand what was intended at that time. I did not bundle up my working clothes. I did not intend to go down if I could get out of it. I knew that there was something going on; I did not know what it was. I did not want to go down to the depot. I did not care to mix up at all. I knew somebody was coming down there, but not who. I was not advised that there was anybody coming on the train. That there was a train coming at eleven o'clock from up the creek. Never said anything about miners coming or any body being on the train. I expected there was a body of men on the train coming from up the creek, but I was not told it by anyone. I was simply told that the train would be there at eleven o'clock and to meet the train. I knew it was to meet the train and the men on it. I understood what was meant. I did not know what the purpose of those men was in coming there. I did not make myself ready to go there. I went out on the street to learn what was going on, and met two or three of the boys, and they told me to stay up on the street and not to go down, but I could not find out what was going on. I was ad-

vised not to go on account of being a marked man. I do not think that I should have gone but for that. I never saw or knew of any conspiracy, agreement or understanding between the members of the miners' union at Wardner that they should meet any men at the train and join them in any unlawful act, as against the Bunker Hill or its property. So far as I knew, being a member in good standing, I never learned there was any such agreement. I never knew anything about it. The miners' union of Wardner requested me and the other men to go and guard the property of the Last Chance on Tuesday night before the trouble which was on Sunday. I remained on guard there from about seven o'clock at night until one in the morning, and then went home and went to sleep till morning. Am not a married man. Live in Wardner about a mile and a quarter from the depot. Did not go to the depot where these men came and did not see any of them. I saw two or three of the defendants that morning in front of Mr. Cox's grocery about half-past eight or nine, long before the arrival of the train. I saw Mr. Bundren there and talked with him. I was around the town all that day until about three o'clock in the afternoon. I testified on the trial of Paul Corcoran in the District Court of the First Judicial District of Idaho, in and for the county of Shoshone. I think I testified at that time that Day was recording secretary; that I did not know what his other name was. I knew him well by sight, but as far as knowing his name I did not. He was financial secretary. Have only attended three meetings of this union. Do not think I said on that occasion that Mr. Day was recording secretary.

If I did I made a mistake about it. The rules of which I have spoken of the union were in print. Never had a book containing the rules or by-laws of the union, but I have seen them. Have not read them. Do not know anything at all about the rules of the union only what I learned in the meetings I attended. After April 29th I was arrested and was under guard about fifteen hours. Gave testimony before the coroner's inquest two days after I was let go. Do not think I testified there who was recording secretary. Am not positive about that. Was never imprisoned after that. Have been stopping in Wardner since that time. Worked for the Last Chance until August 5th, and then went to the Bunker Hill to work. Went to work for the Bunker Hill August 5th, about half-past six at night, and have worked there continuously since that time. Have had no conversation with any of the Bunker Hill people concerning the testimony which I would give on this occasion.

Redirect Examination.

I do not think there is anything in the oath which I took when I joined the miners' union that would obligate me from coming into court and testifying to the facts in any particular case when subpoenaed by Government or State. We were guarding the Last Chance property because the union feared that the men still working at the Bunker Hill would injure the Last Chance property, if I understood it right, and they wanted to guard the property for fear the nonunion men would injure it. In these meetings of the union that I attended previous to the 29th when the trouble between the

Bunker Hill and the local union were discussed the recording secretary, Dennis O'Rourke took no part in those discussions more than to make a little amendment, something of that kind—make a little talk once in a while. I do not recollect that Dennis O'Rourke said anything to the effect that in case the members of the Wardner union needed any help they would get it from the mines above. That proposition was given out publicly to the lodge.

Recross Examination.

I understood the statement that the other unions in that vicinity would render assistance to the Wardner union to mean that they would render financial assistance in case of a strike, and any assistance that was required, I suppose. There was nothing said in that union at any time, to my knowledge, concerning any assistance in the way of violence. They were to have financial assistance, as I understand it, any assistance that was called for. There was nothing said publicly at any time in the union about receiving any assistance other than financial, and I never heard anything said privately. I am sure there has been money sent there to help women without any husbands and children without any fathers who were discharged on account of being union men. I do not know how much money was sent for the purpose of aiding the wives and children and miners who were turned out of employment on account of being union men. There is money paid out yet for that purpose.

Re-redirect Examination.

I do not think there was any talk among the members of the Wardner union that necessary force would be exerted to drive the nonunion employees out of the camp or prevent their working in the Bunker Hill and Sullivan. I did not know what was to be done, and do not think any of the local members knew what was to be done. The strike was declared in open meeting. Any plans they might lay, as far as I know, would rest with a committee. I saw Mr. Bundren, one of the defendants, in front of Mr. Cox's store the morning of the 29th. I think he was a member of the miners' union. He was in the hall during these meetings. I saw him about nine o'clock in the morning before the arrival of the train from Burke.

Testimony of Albert Burch.

Reside at Wardner, Idaho, and am superintendent of the Bunker Hill and Sullivan Mine. Have been such superintendent continuously for about two years and a half. About the 19th or 20th of April, I discovered some notices posted up, reading as near as I can recollect, "Wardner, Idaho, April 13th, 1899. At a regular meeting of the Wardner miners' union, April 18th, W. F. M., held upon the above date, it was decided to request all men employed in and about the Bunker Hill and Sullivan mine to make application for membership in the Wardner miners' union immediately. (Signed) N. A. Flynn, Committeeman." That attracted my attention to the possibility of there being agitation in progress in

the mine. Prior to that I had no idea that there were any union men to amount to anything employed by the company. On examination I found that we had seventeen, which I discovered as early as the night of April 22d, and gave instructions to the shift bosses to discharge those seventeen the next morning, and they were discharged. The next morning I found that notices were posted, of which I cannot now give the wording, but calling for a meeting of the Wardner miners' union and sympathizers at the miners' union at seven o'clock in the morning. The next thing I saw in connection with that was quite a number of our night shift men with their best clothes on going down town. Some of the day shift men did not go to work. Perhaps thirty or forty of each shift left and went down town about seven o'clock, or shortly after. In the afternoon of that day, about half-past five, I saw about a hundred men coming up the road, and they marched up to the office of the company, lining up between the office and the boarding-house. Their leader was Mr. Ed. Boyle, president of the Wardner miners' union, and on his right was Mr. Dennis O'Rourke, and on his left a man whom I did not know. They said nothing until they were all in position, and then Mr. Boyle mounted the steps of the boardinghouse, and said he would like to make a little address to the night shift, who were then standing there waiting to go on shift. I told him to go ahead and make his address. As near as I can remember, he said, "Gentlemen, we have come up here to show you the strength of the Wardner miners' union. There is only about half of us here—part of us working over there in this other

mine around the hill—and we have made a demand to-day on the Bunker Hill and Sullivan Mining Company for an increase of wages and a recognition of the union, and the demand has been denied. We have therefore declared a strike against the Bunker Hill and Sullivan Mining Company, and ask you all to come and join us. We will hold a meeting down in the hall at half past seven o'clock by your time, to-night. Would like to have everybody come down and join us, and regardless of what we may have had against you before." When he had finished, I told our men that I was authorized by the company to make an advance in their wages, from two and a half to three, and from three to three and a half, but we could not recognize the union under any consideration, and if any of them cared to join the union they could come and get their time at the same time. They then talked individually with quite a number of men who were waiting to go on the night shift, and after a few minutes left and went down to a bridge about a thousand feet below where we stood, and waited there on the bridge for the day shift men to come out. When the day shift men came out, I told them that they would be waited upon by the miners' union, which was waiting below, and they would be asked to join us, and I gave them the same statement, practically, that I had to the night shift men before, and, when the day shift men passed them, the miners' union did not succeed in stopping many of them. I suppose on that occasion they got three or four members to join. The next day, as far as I am concerned, I went ahead with the work as usual, but I occasionally saw that meetings were in progress

down at the union hall and at different times. On Tuesday evening about half past five about three hundred men came up the hill, and with the same leaders as before, lined up in the same order, and Mr. Boyle again addressed our night shift men, who were waiting to go on work, and told them he would give them their last chance to join the miners' union; that a meeting was to be held immediately, and, if they did not avail themselves of that opportunity, there would be another proposition made to them. A few minutes later there was some considerable confusion, and I did not hear just the remark made by Mr. O'Rourke, but he made some remark to Boyle in a low tone, and Boyle said, "We cannot make that proposition; we will have to postpone that until morning." There was the same general talk with the men who were waiting to go on shift that there had been before, and, when the day shift came off, some of them were taken hold of and stopped by men who represented themselves as members of the Wardner miners' union. One of them told me he was Michael Turner, but there was very little evidence of any violence at all, and after waiting there for half an hour they went back down the hill, taking three new members with them. The following morning about five o'clock I was awakened by a watchman, got up and dressed, and went down on to the dump, from where I saw a crowd of men on the hill around the tramway. That was Wednesday morning, April 26th. By the use of a glass I saw these men were armed. Saw another crowd of men, judge about two hundred, filling the road at the Last Chance mill; also saw about twenty men in the road within about one

hundred or a hundred and fifty yards of where I stood, and saw that they were stopping some of the day shift men, who were coming up to work, and apparently using some force; so I went down there, and while I was there they attempted to turn back some three or four different men. One of them was E. K. Van Kuren, and another one was Chris. Crumley, and another one was Tom Grover, and there were two others whose names I cannot think of just now. There was a man in that crowd who told me his name was Clemmons; another told me his name was Michael Turner; another by the name of Nels Paulson; another named John Redness; and another by the name of A. A. Matson. I remonstrated with them about turning our men back, and they asked me what I was going to do about it. I told them I would make complaint and have a warrant issued for their arrest. They said, "That is what we want; have us arrested, that is all we want." But later, Nels Paulson said: "There is no use of us staying here any longer; there is not enough of us here to do any good. Let's go down below." They went down below and joined the main body, which was just above the Last Chance mill. Don't remember anything else of importance that occurred that day, but that our tramway was stopped during the day. Do not remember anything else of importance until the day of the blowing up of the mill. Saw the train come in, a mixed train of gondolas and box-cars. There may have been a passenger coach or so. If there was I could not distinguish it, and a dense crowd of men all over the tops of the cars. It stopped just above the O. R. & N. station, and a little later I saw the passenger train come in and

stop at the station. Stopped there perhaps fifteen or twenty minutes.

Cross-Examination.

I believe that Mr. Boyle stated in the last talk he made to our employees that that would be the last chance they would have, and if they did not take advantage of it, that another proposition would be made to them in the morning. I noticed that Mr. O'Rourke made some remark to Boyle, but did not hear what it was. I heard Boyle's reply. He said, "We cannot make that proposition now; there is too much confusion here, so we will have to let it go until morning." My conclusion was that they were not going to let them go to work again; that they were going to use violence in the morning. Boyle did not reply, "No, we cannot make that proposition now, we will make it in the morning." He said, "We cannot make it now, because there is too much confusion here; we cannot get them all together; we will make it in the morning." I think O'Rourke's suggestion must have been to make the proposition known to these people. I do not know what O'Rourke's suggestion was. I think my understanding of it would be that O'Rourke made the suggestion to make known the proposition then and there. Some time before the 29th of April I discovered that seventeen union men were working in that mine, and ordered them discharged for that reason, after that notice was posted—because they were agitators. It was not a fact that I had been discharging men right along for being union men. It was the rule of the company that not too many union men be allowed to work there.

I was the judge of what would be too many. When there was an active movement being made to convert the whole mine into a union mine, I would consider, probably, that two or three union men would be too many, but, when there was no active movement in progress, it would not make any difference to me whether there would be thirty, forty, or fifty working there. I testified in the Paul Corcoran case in the District Court of the First Judicial District in and for Shoshone county. I testified as follows in that case: These men were let out because they were union men. We had been letting out men because they were union men ever since I have been with the company. We made some exception to it, but when we found out they were union men we gave them their time about that time. The knowledge of the fact and the discharge of the union men came about the same time. That is the testimony I gave. I had instructions from the company to keep the force of union men down to prevent agitation in the mine. In reply to Boyle's speech I informed them that we would raise the wages to three and a half and three dollars, and said, inasmuch as the union had declared a strike against the Bunker Hill and Sullivan Mining Company, that no union men would be employed at those increased wages, and that any man joining the union might at the same time come and get his time. Three or four went off with Boyle. These men quit. Prior to that time we had been paying three dollars for miners and two fifty for laborers. We made a raise of fifty cents on each class. That did not result from the union agitation. That matter had been under consideration for some

three months. The day prior I had seen a letter from the manager, in which he had authorized a proportion of that increase, and Mr. Burbidge told me that it would probably be unsatisfactory to the men to raise the wages of part of them and not raise the wages of the other. I wired for instruction to raise the wages of the others, and did not raise the wages until we got instructions to do so. We would have raised the wages if there had been no union. I am still in the employ of the company. I do not think I have any bias or prejudice against these defendants. There is some of them I would be very sorry to see to have to serve sentence. Others would not hurt me a bit to see serve sentence. They have never done me any personal harm. The evidence is pretty strong in my mind that they did do somebody else harm. For some of those men with whom I have a personal acquaintance I have rather a kindly feeling, and feel sorry for them, but those I do not know at all I have no feeling one way or another. I think it would probably improve their morals somewhat to be convicted. I testified in Wallace concerning an interview I had with Mr. Simpkins. I did not have any interview with Mr. Simpkins, and try to induce him to identify parties who were on the train on the 29th day of April, and who came on that train from Burke to Wardner. I have had several interviews with him at different times. After he was put in the bull-pen I had a conversation with him. No one else was within hearing. He was brought out by a colored soldier, who paced back and forth thirty or forty feet away in front of us. I did not cause the soldier to use his bayonet on that occasion. It is proba-

ble that when Mr. Simpkins marched out in front of him there, that the soldier had his bayonet pointed toward him, or pointed toward the ground, or carried over his shoulder. I did not pay any attention to how the soldier walked. This conversation I had with Simpkins was out near McIntosh's lumber office, just a short distance from where the bull-pen is now situated. It was not in a room. I asked permission of the man who had charge of the affairs there, to have an interview with Simpkins. A friend of his asked me to try and get him out of the bull-pen, and I was trying to do so. I gave the following testimony in the trial of Paul Corcoran: I did not say on that occasion, "Simpkins, we have enough evidence to hang you—you cannot get less than fifteen years; you have got a valuable invention, a patent you are liable to get big money out of, but how can you enjoy money when you are in the penitentiary?" or words to that effect. I do not think he said the men that led the mob are out of the country. I returned him to the solider in charge. I went to the bull-pen because a mutual friend of ours had informed me that Mr. Simpkins was anxious to get out, and asked me if I would help. I knew there was only one way to get out—to tell the truth. I was not the judge of the truth. They turned him back to answer any charge against him. I did not go to the bull-pen and have Simpkins brought out by four soldiers. By one soldier. I gave that testimony at the trial of Paul Corcoran. The substance of what I said to Simpkins is that I told him that Phil Weber had been to me and wanted for me to try and get him out of the bull-pen, and I told him I had been to

see Mr. Sinclair on the subject, and he told me if Simpkins would tell the truth about what he knew in the matter, undoubtedly he would be released. Then I told him I had gone to the officer and asked to see him; that the officer would not let him go without a guard, and that the guard could stand away a little ways, where he would not hear what was going on, and I then asked him if he was willing to go and tell the truth in regard to it, and Simpkins said he did not know anything about it at all—that he had nothing to do with it—did not know anything about it; and I insisted that the chances were that evidence would be brought up against him which would show that he did know something about it, and the best thing he could do, if he really wanted to get out as his friends told me he did, that he had better tell the truth. He said, "Well, I will tell everything that I know," but he says, "I do not know anything." Later I reported this to Mr. Sinclair, and he said that would not do; he would have to stay in there. So I made every effort I could to get him out that way, and let it go that way. Up to that time Simpkins had been in the employ of our company. He had been a contractor, driving a contract drift. He was working for himself in one way, and one way he was working for the company.

Testimony of Walter Taylor.

I live in Wardner and have resided there two years in January. I am engaged in tramway work for the Bunker Hill Company. The week before the 29th of April I had been laid off for a few days and I went up on the 26th to go to work. On the morning of the 26th

I started up to work and Ed. Boyle and quite a crowd of men was up there at the Last Chance mill, and they stopped us and said there would be no work that day. He got out on the bank and made a little speech, and told us he would give us four minutes to get back down the hill, the language was. He pulled out his gun at the same time; so we went back down the hill. We did not go to work that day. I do not know the names of any of the men that were with Ed. Boyle at that time; there was quite a crowd there—between a hundred and fifty and two hundred, I suppose. I don't know whether they were members of the Wardner union. I know he was himself; he was president. Boyle said that would be the last work we would do; we would not work any more unless it was under the protection of the soldiers. Boyle pulled a gun and there was another fellow pulled a gun and a watch. Said they would give us four minutes to get back down the hill in; any man that was standing there when the four minutes was up he would die.

Cross-Examination.

I have been in the employ of the Bunker Hill and Sullivan since a year ago last March. Am still in their employ. Am a nonunion man. Have no ill-feeling toward the union men. They always treated me all right except that one time. Boyle told me to get down the hill; he was one of them.

Testimony of I. T. Rouse.

Live at Wardner. Have resided there nearly a year and work for the Bunker Hill and Sullivan. Have

worked for that company since the 10th of last February. Worked for that company during the month of April last. Did not work on the 26th of April. I started to work but was stopped by a crowd of men. Ed. Boyle was there and a number of men that had been employed by the Bunker Hill Mine, supposed to be union men. They stopped us and told us we could not go to work, and asked us to wait there a short time, until they got them all together, as they wanted to make a speech to them. During that speech which Mr. Boyle delivered he told us that we had better join the union, as we could not work there unless we did, unless we worked under the protection of soldiers, as they had thirty thousand miners behind them. He stated that the Western Federation of Miners was behind them. I went back down the hill and judge about fifty or sixty men went back. They were men who were working in the Bunker Hill Mine. I saw no violence inflicted on any of these Bunker Hill men. I saw these union men take hold of two or three men, stop them.

Cross-Examination.

I am a union man at the present time and belong to the Wardner Industrial Union. It is not called the Hawley union or the Forney union. It has been organized since the occurrence I have mentioned, since the 29th of April. I think it was organized in June. A portion of the people working in the Bunker Hill and Sullivan have joined that union. Not all of them. I was a nonunion man at the time of these occurrences. I am nonunion yet so far as the class of men in the old organization is concerned.

Am a union man and have always believed in unions. Never belonged to any of the unions in the Coeur d'Alenes. There is a bitter feeling between the non-union men and the men who created those disturbances, as a union—they created this riot there. So far as I know there existed no ill-feeling on the part of the non-union men toward the union men. They associated together there anywheres, the same as workingmen always do. I know of no trouble between them at all. I entertained ill-feeling toward the old union and have that feeling yet.

Testimony of W. P. Sutherland.

Reside at Wardner; occupation, laborer; work for the Bunker Hill and Sullivan Company. Have been in their employ four years, three months and a half. Was in their employ during the month of April last. Am a member of the Wardner Industrial Union. Am not a member of the Western Federation of Miners. On the 26th of last April I started to go to work and was stopped at the Last Chance Mill and told there would be no work at the Bunker that day. Ed. Boyle told me; so did Bill Gnoose, Albert Rasmussen and Ed. Johnson, and probably more than that. They claimed to be members of the Wardner miners' union. I believe they said there would be no more work unless we joined the union, without being protected by soldiers. Did not go to work that day because I was stopped and could not get through the crowd. As I was walking through the crowd, elbowing my way through, I was caught hold of by Ed. Johnson and Albert Rasmussen, and I asked them what was the matter, and

they said, " Stop; step to one side; we want to speak to you a minute"; said "You won't be harmed at all." I said "All right," and I walked back in the crowd, behind the crowd, and we had not been standing there very long until someone pulled out a watch and said he would give us four minutes to get down the hill; if we did not go down there by that time every man up there would be a dead man. Some of them pulled guns—Bill Gnoose for one; and I do not know how many others. Several guns were pulled there. I judge about forty or fifty men who had been working in the Bunker Hill Mine went down the hill. That was the 26th of April. I did not work at all that day.

Testimony of F. R. Culbertson.

Reside at Burke; am manager of the Tiger-Poorman there. Was in Burke, Idaho, on the 29th of last April. Am acquainted with Paul Corcoran. Am not a member of the Burke union. At that time Paul Corcoran was a member of the Burke union. I had some conversation with him on the morning of the 29th of April. I had made arrangements to go east on that morning. Got up rather early to take a hand-car to go to Wallace to make connection with the Northern Pacific train, and noticed that there was nobody working; the men were on the streets. Attempted to find out from the men why they were not at work, but was unable to learn anything from the men themselves. Was informed there was a meeting going on in the miners' union hall; so I sent a messenger in and asked Mr. Corcoran if he would step out and see me for a few minutes. He did so, and I stated

to him that I was going away, and noticed that something very unusual was going on, and if there was going to be a sympathetic strike in connection with the Bunker Hill affair that I would not leave, but if there was to be no strike, as my arrangements were made to go east, I wanted to go, and would like to have him tell me what was going on. He stated to me that there would be no strike at Burke or trouble there; that if my arrangements were made to go east I might as well go; that they were going to Wardner that morning. This conversation was about six o'clock in the morning, slow time. The difference between Burke time and slow time is one hour. The Tiger-Poorman employs about one hundred and ninety to two hundred men. The men who worked in that mine at that time were union men. They did not work the 29th, but worked the day before and the evening after. A few of them worked that night.

Testimony of Joseph McDonald.

Reside at Gem, Idaho; am manager of the Helena and Frisco Mine, which is located at Gem. Have been manager of that mine for seven years continuously. On the 29th of last April I was at the Frisco Mine which is about 1500 feet east of the town of Gem. Our mine employs about two hundred and forty men. Two of them, I believe, worked that day. They told me they were going to Wardner. The powder-house of the Helena and Frisco is a thousand feet east of the mill. I was at the powder-house that day. I found that the lock had been cut and the door was open and some of the powder was

gone. Eight boxes, containing fifty pounds each, were gone.

Cross-Examination.

The powder was put up in boxes with a brand on it.

Testimony of Ren Smith.

My residence is Wallace, formerly Gem; occupation is that of a stage-driver and general transfer business. On the 28th and 29th of last April I was living at Gem, Idaho. I live on the west side of the street, about two hundred feet opposite the union hall in Gem. Do not know anything unusual that occurred on the night of the 28th of April. Was not in Gem all that night. About 11 o'clock on that night, after I had gone to bed a few minutes, there was a party came to my house and wanted me to go to Wardner, and I told him that I did not want to go, that my team was tired; I had made two trips to Wallace that day. He said he had some friends there that wanted to go to Wardner, and wanted me to take them. I told him I would hitch up and go as far as Wallace, and if they could not get anyone at Wallace I would go on to Wardner. Hitched up and went to Wallace. Got back about 3 o'clock. Morris Mahoney asked me to take this party to Wardner. He is a member of the miners' union. Some of the parties went to Wardner and one went to Mullan, according to their statement. There were five in the party. As I was going down I told them I did not like to drive to Wardner, and would go to a livery-stable and see if I could get a livery team to take them, and some one in the crowd suggested the idea of getting saddle-horses, and

one remarked that probably that would be the better way, as they could then go to Wardner by means of the trail, the short route. Drove along to the Bi-Metallic Hotel, and one of them said he would get out there, that he was going to Mullan, and paid me. The other boys said they might as well get out there. They paid me. I asked where I could find them in case I got a team. They said the Bi-Metallic. Went to the proprietor of a livery-stable and he hitched up a rig and took them. Don't know who those five men were. I heard their first names mentioned. Did not pay any attention. They were strangers to me. Remember one was Dennis. The next morning my wife woke me up about eight o'clock and heard an unusual noise; seemed as though there were a lot of people walking around. She went to the window and saw a crowd of men going backward and forward, and noticed that the night shift men and day shift men were out there and that some of them had guns and masks on, and she said: "There is something happening; there is men out there; all shifts is there, and everybody is running backward and forward. Something has happened, something wrong. I see men with guns there and they are masked." I said, "I guess they are running somebody out of the country. Lay down and sleep. You do not want to go out there." She wanted me to get up and see what was wrong. I got up and dressed. Went to the door and called to a man passing that I knew and asked him if there was anyone hurt, and he said "No." I said, "What is wrong?" "Well," he says, "we are all going down to Wardner." Don't know the man's name. He is a blacksmith that works at the Helena and Frisco. Went down to the barn,

got my breakfast, and was back and forth on the street. After the train left, hitched up and went to Wallace. Did not see the train come in from Burke. Saw it stop at Gem. It was the regular morning train on the Northern Pacific. I saw armed and masked men on that train. At Gem saw armed and masked men get on the train. They came up and down the street, on the sidewalk and on the train, and some came out of the union hall, and some went in. They were going back and forth. The men I took to Wallace that night were joshing, and were a jolly crowd. Were joshing one another about shoveling hay in the Palouse country. One man remarked they might be glad to shovel hay in the Palouse country before they were through with this.

Cross-Examination.

It was about 8 o'clock when I saw the blacksmith. Saw him passing my dwelling and called to him. He said they were going to Wardner, meaning the men in view there. Did not say he was going.

Testimony of Emil Anderson.

Reside at Mullan, Idaho; occupation, miner. Have resided there about one year now. Was at Mullan on the 29th of last April. Was a member of the Mullan miners' union. Am working for the Morning Mine. Did not work that day. Went up to work that morning and saw some men that told me there was not going to be any work that day. Said there was going to be a meeting at the union hall. Don't know who the man was. Don't know his

name. Attended the meeting a short time. We was to go to Wardner. Orders were given to mask. Charlie Olsen was president of the union. Could not say for certain it was he gave the order to mask, but heard the order given. They said they would not mask. They said they would not do anything wrong and would not mask. Don't know what the object of going to Wardner that day was. Went to Wardner that day. Walked down to Wallace and took train from there to Wardner. There was about a hundred men with me from Mullan to Wallace. Saw some men with guns and masks when I come down to Wallace. They call it about seven miles from Mullan to Wallace. Did not count how many men I saw with guns on the way down. Could not say how many. Saw some masks on the way down. From Wallace I rode down on a flat-car. Have no idea about what train it was. There was a large number of men on that train. Didn't notice any passenger coach on it. I was standing on the platform and somebody hallooed "All aboard," and I got on the flat-car. Don't know who hallooed. At Wardner got off the train and was around the depot. Went to a restaurant and had dinner and was around there all afternoon. Saw masked men at Wardner. Saw armed and masked men on the train coming down. Don't know if I seen any on the flat-car with me or not. Don't know what the purpose of those men going to Wardner was. Did not hear any declarations in the hall that morning or on the way to Wardner as to what they were going there for. In the hall the president said there was nothing wrong going to be done. He was the one that ordered the men to mask.

Made no inquiries as to whether there would be work on that day after the man told me there would be no work at the mine. Don't know if any men worked or not.

Cross-Examination.

Up to the 29th had been working at the Morning mine. Did not know what I was going to Wardner for and never inquired. First saw the armed and masked men in Wallace. Of the one hundred men that came from Mullan to Wallace I did not see any of them armed. Sometimes we marched two and three and sometimes alone. Could not see all of them. If half of them had been armed and masked I would have noticed it. I did not see any masked men between Mullan and Wallace, and did not meet any on the road. Did not see anyone at all armed. We all walked down to the depot in Wallace, or the bulk of them did. We stopped at Wallace between five and ten minutes. I didn't notice any armed or masked men on the flat-car with me. Some were standing up and some sitting down. Could not say for certain if there was any on the flat-car under mask. Saw a few upon a box-car. Could not say how many. Saw masked men at Wardner. Have no idea how many. Had no arms or mask with me. I did not at any time before going to lunch ascertain what those armed and masked men were doing or intended to do. I never found out. I was not below the depot. Returned to Wallace on the train and walked from Wallace to Mullan. Left Wardner between 4 and 5 o'clock and reached home between 7 and 8. Rode back inside a box-car. Did not see

any armed or masked men in the car. Saw some when I went in. Was afterward arrested and imprisoned in the bull-pen and kept there pretty close to seven weeks. Was arrested the 6th of May. Did not testify before the coroner's jury on the inquest held upon the body of James Cheyne or John Smith. I gave just what I gave here. Have been working about one month now since my discharge from the bull-pen. Am working in the Morning mine. Was working when I was required to come here. Took my old place at the same wages, three and a half. I do not know for sure that it was the president who gave the order to mask. I would not swear whether it was him or not. The men assembled said they would not mask, that they did not intend to do anything wrong. There was no discussion that I heard about going to Wardiner. Did not try to find out what all these men intended to do in going to Wardner. Was never able to find that out.

Redirect Examination.

The train was at Wallace ahead of me. Nobody asked me for any fare.

Testimony of John Anderson.

Am a miner and reside at Mullan. Have lived there a little over two years. Worked for the Morning Mining Company during the month of April last. During that month was a member of the Mullan miners' union. Did not go to work on the morning of the 29th of April. When I was going to the mine met a few fellows coming down and they said there was no work, so I went home; then

went up town again. Was at the meeting of the miners' union at the hall a few minutes that morning. Said they was going to Wardner. Didn't say what for. They said they would not mask. Heard no statement to the effect that the men must or should mask. Heard orders given by the president to mask. He was Charlie Olsen. They did not mask. After they left the hall they walked to Wallace. About a hundred men. Did not see any men on the way to Wallace have arms or bundles of any kind. I seen some men on the other side of the river. Don't know what they was doing there. They were three or four hundred feet away. Did not see any men on the road to Wallace with masks. From Wallace I went on the train to Wardner with the boys to rest. On the train I seen some men armed and masked. I think about a dozen. At Wardner I went over to the restaurant and was there until about the time we went back. Paid no fare. When I went to Wardner rode on a flat-car. Going back rode in the passenger coach.

Cross-Examination.

Am a brother of Emil Anderson, who was on the stand before me. Was arrested after the 29th of April and put in the bull-pen. Was kept there about seven weeks. My brother and I was let out at the same time. Was working in the Morning mine before I was called here as a witness to this court. Went to work at the same time my brother did. Was restored to my old employment. Left Mullan about 9 o'clock on the morning of the 29th of April. Took about an hour to reach Wallace. I marched right along

with the main body of Mullan men. My brother was in the same party. Do not know how many went out in a field. I was away behind. Don't know if those men returned. The body of men I started with was composed of about twenty-five. They was ahead about five hundred feet. We had marched about six miles from Mullan when these men went out in the field. Could not say how far they went out into the field; say five hundred feet, anyhow. I passed them right there. Some of them stopped there and some went ahead. I see they had guns there in the field. I did not see them afterward. They had no arms when they went out in the field. I did not see any of them with arms before I come to the depot. They had no guns when they went out in the field, so they must have obtained arms out there in that field somewhere. I did not see them uncovering arms and do not know how they obtained them. Did not see this party after that. My brother went on by the point where these men went into the field. I testified in the case of the State against Paul Corcoran in the District Court of the First Judicial District of the State of Idaho, in and for the county of Shoshone. I gave the following testimony: I heard them say they would not mask, because they were all good citizens. I heard them say that (referring to meeting at Mullan on the morning of April 29th). I could not tell whether there was a motion made to mask. I heard a couple of fellows stand up and said they would not put on any masks and they said all right. I gave that testimony. That was all that occurred on that occasion so far as my recollection is concerned. Charlie Olsen was president of that body. What I stated there was all I recollected at the time I

was a witness in Shoshone county. I told all I heard at that time. There must be a mistake there. The president said was going to mask, and a couple of fellows stood up and said they would not mask. I was close to the door and did not see him, but I could hear on the voice that it was him. I thought I recognized the voice of the president. There was a large body of men inside, a hundred. I would not state positively that the president did make this statement. I thought he did; that is my opinion.

Testimony of Fred Funk.

Am a miner and reside at Mullan, Idaho; have lived there a little over two years. During the month of April last I was shift boss at the Morning mine. At that time I was a member of the Mullan miners' union. That mine was then manned by members of the miners' union. I went to work on the morning of the 29th of April last, but did not work during that day. When I was on my way to the mine I met some men going back down, and they told me the men were all going down and there would be nobody to work. They did not say what they were going to do that day. I did not attend a meeting of the miners' union that day. I went to the mine and stayed there until about half-past eight o'clock, and then returned down town where I live, and afterward went along with the men to Wallace and to Wardner. Went on the train that come down from the canyon. I should think one hundred and fifty men went from Mullan. It is seven miles from there to Wallace. The men walked to Wallace. The Northern Pacific Railroad runs from Mullan to Wallace. When we

got to Wallace we met the train coming from Burke and boarded that train. I saw armed and masked men on that train that came into Wallace. Probably seventy-five. Could not state the exact number. I got on the train a short distance above the depot at Wallace, near the "Y," the hospital. Could not state if the main body of Mullan men got on there. There were only two or three men got in the same car where I was. Could not say that I saw other men get on the train at that place. The main body of men was just ahead of me. When I got off the train at Wardner I was around the depot for quite a considerable time, and then went to the restaurant and had dinner and was around the depot and just below there until the train went back. I went back on the train to Wallace and went from Wallace to Mullan on horseback. I believe I saw armed and masked men going back on that train. There were probably seventy-five or a hundred armed and masked men on that train when it left Wallace. My understanding was that the men were going to make a demonstration in sympathy with the Wardner strikers; that is, a peaceable demonstration. I heard no other explanation given after I had seen men with masks and guns on the train. I did not ask for any explanation.

Cross-Examination.

There was probably in the neighborhood of one hundred armed and masked men on the train, but how many others it would be pretty hard to say, because some of them were inside the cars and some were outside. I could not form any opinion. I meant by demonstration at Wardner, that

the men would go there; probably form a procession and go to the company's office, and perhaps appoint a committee or somebody to see the company, and ask that the demands of the strikers be granted, or something of that kind. That was the purpose I supposed in view. I cannot say what the purpose of the armed and masked men was. I did not go any farther than Wardner and returned on the same train with those men. I was arrested after the 29th and kept in the box-cars as long as I was there. The box-car was within the limits of what is supposed to be the bull-pen. Was imprisoned there nearly two weeks. Was then released and went back home. I gave testimony before the coroner's jury in the inquest upon the body of Mr. Cheyne, and Mr. Smith. That was before my release. I was escorted from this box-car up to the coroner's office by soldiers. My testimony was taken and I signed it. I did not sign it after it was translated. About two weeks after my release I went to work at the same mine at timbering. Worked during the month of June and then the work stopped. Went to work again toward the end of July, and have been working steadily ever since until subpoenaed here as a witness. So far as I know, I am on good terms with the company. I was a member of the miners' union on the 29th of April and had been a member about a year and a half. I could not attend meetings at all, on account of being a shift boss, that being one of the rules of the union. Before I went to work the last time I signed a paper. Am not now a member of the miners' union.

Redirect Examination.

As far as the questions covered the same ground, I gave practically the same testimony before the coroner's jury that I gave here. Substantially, my testimony is the same.

Testimony of Miss E. F. Bent.

Reside at Wardner, Idaho. On the 29th of last April resided in Mullan, Idaho. Know where the miners' union hall is in Mullan. I lived diagonally across the street, between one hundred and two hundred feet from it. Was at Mullan on the 29th and saw a great number of men on the streets. They were along the sidewalk in front of the union hall and from that up to the corner across the street. Counted a hundred and sixteen, and that did not appear to be more than half to me. I saw them with arms. Should say they were rifles. In the morning about half a dozen had rifles, when they were going out. Saw them coming back in the evening. Saw a great many more rifles in the afternoon than in the morning. Those men started in the direction of Wallace. Just before they started some one in front shouted, "Up the hill to Wardner." The men formed in regular marching order and marched away in that order.

Testimony of Albert Massing.

Am a laborer; reside at Mullan; have lived there some over two years. Have been working on the tramway on the Morning mine. Am a member of the Mullan union and was a member of that union on the 29th of last April.

Did not work on that day because there was no work. Went down to Wardner with the rest of them. No one told me to go to Wardner. I don't recollect who said they were going to Wardner. Could not say for sure that they were union men. Did not say what they were going to Wardner for. The men who told me there would be no work that morning did not say why. They did not say where they were going. I went to Wallace that day with the rest of the boys. There were some around a hundred. I walked to Wallace. When I got there I got on the train right at the depot. Don't know what train it was. I got on a flat-car. Think I saw some armed and masked men on the train. Could not say how many. The train went to Wardner. Don't know whether it went further or not. Don't know what they were armed or masked for. I got off at Wardner and think the rest of the men did. Saw armed and masked men at Wardner that day. Could not say how many. I walked around the depot for awhile and went into a saloon, and after that went into a restaurant. I went to Wardner to see what they was going to do down there. Heard nobody say what they was going to do. Just got on the train and went with the crowd. Had no idea what these men with arms and masks was going to do. I found out afterward what they did do. Didn't see much that occurred because I was all the time at the depot there.

Testimony of Joseph Phifer.

Am a laborer and reside at Burke. Have lived there about eight years. My business has been just working around the mines, the outside mines. Am not a member

of the miners' union. Was in Burke the morning of the 29th of April last. Started to work in the morning and didn't work a quarter of a shift. Didn't see anybody else working, and went home and changed my clothes and went down and bought a ticket and went to Wallace. I think I saw about two armed men around the train at Burke. They were masked. Saw no more who had arms. When we got to Wallace the men was going to get out of the car and they was told to stay in, and I stayed in the balance. Some of the masked men told us to stay in. They did not tell me. They told the men near the door. I was back in the car, in a box-car. Got into a box-car at Burke. My ticket was not taken up. Went all the way to Wardner in that box-car. I was aboard the Northern Pacific train. There was no masked or armed men in the car I was in. Did not make any effort to get out at Wallace. Some of the rest tried to get out and they told them to stay in. Some masked men told them. I don't know who the masked men were. They was walking along the track. I did not see them. The men near the door said they were ordered to stay in by masked men. I did not see them. I heard some talk. Got out with the balance at Wardner. Had no business at Wardner that day. Did not see armed or masked men on the train coming down from Wallace. Was inside the box-car. Went back on the train. I saw no men in that crowd or on that train who had any identifying marks about them to distinguish them in any way. Did not see where these men came from who were on that train.

Testimony of A. M. St. Clair.

Reside at Wallace. At present am a deputy sheriff and jailor of Shoshone county. On the 29th of April last was at Burke the entire day. There was quite a number of men on the street rushing around from one place to the other. I know where the miners' union hall there is located. Saw men going in and out of there. They were not armed or masked. Saw probably three or four hundred men aboard the train at Burke. Only saw one man who got on the train that had any arms. Could not say where those men came from. They came from the direction of the union hall. A. C. Austin was the man who got on the train. Know Mike Malvey, one of the defendants in this case. First met him three or four years ago. He told me he was a member of the miners' union. Saw him on the 29th of April last. Had some little conversation with him. It was going down to the depot. Saw him get on board the train. Asked him what they were going to do, where they were going. He said they were going down to Kellogg to run the scabs out of the country and blow up the mill. The train was crowded that morning as it left Burke.

Cross-Examination.

Have resided in Idaho since the 26th of last March, the last time. Before that resided in Montana in several different places. Was a deputy sheriff some of the time and running a horse ranch and dealing in horses. Was a witness in the case of the State against Paul Corcoran, in Shoshone county, on the part of the State. My true name

is A. M. St. Clair. As a general thing, in Montana, I was engaged in the business of raising horses. My last business there was raising horses. Had a horse ranch sixteen miles from Livingston, in the vicinity of the Yellowstone river. Last residence in Montana was Hamilton City. Forget the name of the county. Never went by the name of J. St. Clair or Lewis J., or Lewis B. St. Clair. I have been in the penitentiary in Montana. That is where I met Mr. Malvey. Was sent to the penitentiary for hitting a man over the head with a gun—that is my understanding. I testified to the same thing in Shoshone county on the trial of Corcoran. On the 29th of April I was in Burke, driving an express team for my uncle, Ben Stringham. I think he was arrested on the 29th and put in the bull-pen. I was arrested and put in the bull-pen, and was in there from about 12 o'clock in the evening until the next day about 11 o'clock. I gave testimony before the coroner's jury, not on the inquest over the body of Cheyne or Smith. It was some time in May after my release. Stringham was released at the same time I was. Made no statement for the purpose of obtaining my release or that of my uncle more than I told that I had nothing to do with the trouble. My testimony before the coroner was reduced to writing. I signed it after it was reduced. After my release I went to work at the Bunker Hill mill. It was the 6th of May we was put in the bull-pen, and I went to work for the company on the 3d of June, after I had testified before the coroner. Worked for the Bunker Hill Company until the first of September, on the construction of the mill, putting in the machinery, at whatever there

was to do, as a mechanic part of the time. Had charge of some men part of the time. After I left the employ of the Bunker Hill went to Wallace and became a deputy sheriff under Charlie Sutherland. Expect to retain that position when I get back there.

Redirect Examination.

I was pardoned out of the penitentiary.

Recross-Examination.

Was pardoned in 1898 before my term expired. Think my term was two years. The pardon was in writing, issued by the Governor of Montana. It was delivered to me. I have not got the pardon now. Think I burned it up or throwed it away. It is a copy that I had. Governor Smith pardoned me.

Testimony of Joe Riddell.

Live at Mullan, Idaho. Have lived there going on four years with my parents. Was there the 29th of last April. Was up all night before at Billy Bowman's and went up to the Hunter Mine, and all the men were dressed up. I asked them what was the matter, and they told me to go on about my business, and then the cook told me the boys come up and told them they had to go down town. I waited on table for breakfast, got my work done, and started down town. There was men all over the streets and I went up to my mother's house. She told me there was going to be a fight in Wardner. When I come down the men was all lining up, and I joined in the crowd with

a lot of Swedes. We marched down to Wallace. When we got to a manure pile above Wallace we got a lot of guns, and a man gave me a gun to go and get a lot of cartridges for it, and I took the gun and got the cartridges for it. They got those guns from Turner's ranch. About three hundred men went down to Wallace that day. Did not see any men with masks on going down. Turner's ranch is about three miles from Wallace, about half way. A whole gang of men went into that field and got some guns. I did not go. Was about a hundred feet away across the track. Could see what they were doing all the time. They got their guns. They was digging and looking around the brush to see if they could see the guns and they got in the manure pile and got them. When I left they started to bust the tops of the boxes with rocks. I saw them with guns after that. I went on down to Wallace and when I got on the train they was all on the train, a lot of those same men. Saw about fifteen guns in the Mullan crowd; I got on an ore car at Wallace station, and went to Wardner. Paid no fare. At Wardner got off and got something to eat. Walked around and all the men was going down toward the mill, and there was a man on a stump hallooed, "Wardner men to the front." That is all I heard. Stayed there until they got ready to go home. Got on the train and went home with the crowd. Going back we was shooting at the Bunker Hill and Sullivan flume. Saw large number of men on the train with masks. The man who gave me the gun was a Swede. Never saw him before or since. I gave the gun to a fellow in Mullan. Took it down to Wardner with me. Did not know what

we was going to Wardner for until I got down there. Then I heard some men talking that they were going to blow up the mill. Don't know whether those men were members of the union or not. Saw men with masks on the train going back. Did not see the masks removed. Nobody removed the masks from their faces.

Cross-Examination.

After the 29th of April I was arrested and imprisoned in a box-car. Was there two weeks. Could not tell what time I was discharged. Was arrested on the 6th of May. After I was kept there two weeks Sinclair *to*— me up to the Bunker Hill. He is the gentleman in command over there. They put me to work there in the mine. Worked there about a month and two weeks. Then went to Cataldo and worked on the section, on the O. R. & N. Railroad. Worked there about two weeks. Then I got arrested again. They took me to Wallace to the county jail. They kept me there about two weeks. Then they turned me loose and I went to Mullan, and from there to Montana. Have not been arrested at any time since. When I was arrested the second time Batterton told me he had to take me to Wallace for a witness. They imprisoned me to make a witness out of me. Did not give any testimony before the coroner's jury in the inquest of Cheyne or Smith. I left the Bunker Hill because they was always trying to make me tell "who packed the powder" and did this and that, and I did not know. Mr. Roundley talked to me about that.

Testimony of Mrs. Ren Smith.

Reside at Gem, Idaho. Have lived there continuously five years. Was in Gem on the 28th and 29th of last April. The 28th they had a meeting in the union hall all night—at least, 20 minutes past three was the last I saw of them, and the morning of the 29th there was about 200 men there on the streets, all dressed up. Saw armed and masked men among this number. Well, not right then I didn't. When I saw them first I did not see any masked men among them. I saw armed and masked men during the forenoon. It was about half-past nine when I first saw the men. Saw the train come in from Burke. Did not see any armed or masked men get on or off the train. When I saw all the men on the streets I insisted upon my husband going out and finding out what was the matter. That is a usual occurrence when anyone got hurt or killed, they all quit work and dress up. I supposed some one was hurt or killed. I went out and asked one of the members what was the matter, and he said he did not know, and I told him he must know something about it, because it was something unusual; and he laughed a little bit, and said he didn't know anything about it, and said he was ordered when he came off shift at 5 o'clock, he was ordered to go to the union hall by half-past nine to a meeting. A member of the miners' union at Gem came to our house that morning and wanted to know if I would give him a cloth, and I told him I would. I ran a laundry then, and there was a handkerchief lying near, and I picked that up and asked him if that would do. He said it would and asked me if I would cut holes in it. I cut holes in it

and he took off his hat and put it over his face and said that was just what he wanted. He took it off and put it in his pocket. He stood around a little and Mr. Smith asked him to sit down—he was a friend of ours. He said he did not have the time, he had made a motion in the hall and wanted to go and see if it carried. Saw the men come back on the train that night. Saw men who had arms. There might have been a hundred. They all had masks when they got back to Gem. Saw them get off the train. Did not see any of them go into the union hall.

Testimony of J. Bloom.

Live at Gem, Idaho; am in the saloon business. Have lived there eight or nine years, off and on. Was in Gem the 29th of April last. I saw a lot of masked men, with guns, around the union hall—that is, around the train. I have seen some of these men. They got on the train. To the best of my recollection, I guess some of these men went into the hall. I didn't see anybody coming out, because I went home. Saw armed and masked men around the union hall and saw them get on the Northern Pacific train coming down from Burke. It was between 10 and 11 o'clock, I believe. Went to Wardner that day. Just went for the fun of it to see what was going on. Did not know anything about it. Just came there about five minutes before they left Gem. After I got on the train heard they was going to Wardner. Paid no fare. Nobody came around to collect it. At Wardner stayed around the depot. Went down below with a couple of fellows; come back and got a couple of drinks and went home. Saw a

good many armed and masked men going back. Saw some of them get off the train at Gem. I got off way down below and went right home. The men went in different directions. I did not watch at all. Don't know whether I saw fifty or one hundred or five hundred armed and masked men that morning. I don't know. There was quite a crowd.

Testimony of G. A. Olmsted.

Live at Wallace, Idaho. Am a railroad man, a conductor on the Northern Pacific. Have served in that capacity about six years. My run is from Wallace to Burke. The distance between those points is about seven miles. I run a mixed train. We haul freight and passengers, mail and express. We haul the mail every day. Make two trips a day through the week and Sundays one. Carry the mail on the morning trip and on all four trips. Was on that run the 29th of April. Leave Wallace at 8:45. Due in Burke at 9:30. It is about 45 minutes' run. Coming back we are due at Wallace at 11 o'clock sharp. We have no time card. We are due in Gem coming back about 10:30. We use fast time there, called Mountain Time. That is one hour fast. Left Wallace on the regular run on time that morning. Did not notice anything unusual going up, but on the arrival at Burke I noticed an unusual number of men on the streets. When we left Burke we had more passengers than we usually have. Then I did not notice anything out of the ordinary until we got to Gem, where we found quite an unusual crowd, and a good many of them masked and armed. We had stopped at Gem and I was standing on the platform and a masked

man asked me how long we was going to stay. I told him just a few minutes, long enough to get the passengers. He says, "There is a lot of men over in the mill here wants to go to Wallace. Can't you wait a few minutes," or something to that effect. I said, "We will wait about two minutes, no longer." About that time a couple of more masked men with guns says to me, "We have got a guard on that engine and you will have to wait until we get ready to go." So I told him we would wait. We waited there probably 20 or 30 minutes. Don't know the exact time. This masked man came around to me and said they wanted to go back to the Frisco powder-house, which was about half a mile back west, and I told him we could not back the train up hill. He says, "Well, you can get out some of the cars. We have got to go back there with one car." I went over to the engineer and asked him if he could back the train up. Told him they wanted to go to the Frisco powder-house. He says, "I guess so, I will try," so I got on the train, and we backed up to the powder-house, where they loaded a lot of powder in one of the box-cars. After they got the powder loaded they says, "All right; you can go down and stop at Gem," which we did. There was a large body of men got on there, and we went from there to Wallace. Before we got to Wallace a masked man came to me and said they wanted to go to Wardner, and wanted to know if I would go with them, and I told them we could not go to Wardner with our engine, as it was too heavy to run over the O. R. N. bridges, trestles. Told him it would not be safe; we would have to have a lighter engine. Then he says, "If we get a lighter engine can't you go?" I says, "I

can go, providing you get orders and make arrangements for the train. If you will see the superintendent and get orders we can go." He went on. I did not see him any more until we got pretty near to Wallace, along down about the junction switch probably half a mile from Wallace. He said they had concluded to take our train and go to Wardner, and wanted to know if I would go with them. I says, "Only on one condition, providing you make arrangements for the train and get a lighter engine. It is not safe for our engine to go over the O. R. & N. track." He says, "Well, that is all right, we will fix that," or something to that effect. He says, "We are going to take your train; we have got to go to Wardner, and we are going to take this train, too. We will go and see the superintendent and make arrangements, just as you think best." When we arrived at Wallace we went to the superintendent's office, right close to the depot, and he was out. Then I started to go into the depot to telegraph our superintendent in Missoula, and the operator who was outside said the wire was down to Missoula. Then I said to the masked man that was with me, "We can go up to the O. R. & N. and see if we can get any orders there." The superintendent refused. We walked back to the Northern Pacific depot and the train had gone. There was an extra engine standing on the siding and probably eight or ten masked men on it. They said they was going to take that engine and go to Wardner. We went over to where the engineer lived and he came over and got on his engine and we went to Wardner on that light engine. There was quite an excitement at Wardner. There was big gangs of masked men there, armed, and the mill was

blown up. I stood around the depot. We were there about three hours. Then we returned to Wallace. Left Wardner about 3:30. The two engines were coupled together. From Wallace to Wardner we run over the O. R. & N. The Northern Pacific stops at Wallace; does not go to Wardner. The cause of the delay at Gem was that the mob had taken our engine and crew and said we could not go until they got ready. We had to back up to the powder-house was the cause of the delay. We made about three stops between Burke and Gem. Stopped first at Mace, half a mile from Burke. That is a regular stop for passengers. The next stop we made at the powder-house. The train stopped half a minute or a minute at the powder-house going down. I did not order the stop. Was busy taking up tickets. Did not see them getting any powder aboard on that trip—not the first stop. After we got to Gem we were ordered to go back to the powder-house. We stopped at the powder-house that time from two to four minutes. Saw them loading a lot of powder into a box-car there. Did not see them unloading powder at any time. The men on the wild engine were most of them masked. All but one, if I remember right. Did not know him; never saw him before, that I know of. They were armed. Did not recognize anyone on that train coming from Burke to Wardner. Do not know who this masked man was whom I took to be the leader. He was masked all the time he was with me and did not raise his mask.

Cross-Examination.

I collected fare that morning beginning at Burke. Took all I could get. I ceased taking fare at Wallace. Some of the armed and masked men paid their fare and some did not. I think probably there were others who were not masked who paid their fares. We mean by a mixed train one that handles passengers, freight, express, and mail. Hauls freight cars and passenger cars. We had no car that was marked "Mail-car." It was just an ordinary combination coach marked "Northern Pacific." Nothing else on it. We have a regular schedule time we are governed by. That is prescribed by the time card. I run on that schedule time as near as I can. We are oftentimes delayed. We were most generally on time, but occasionally behind time. That is caused by handling freight, doing the local work. We were not delayed that morning by handling freight. We were on time in coming from Burke to Wallace. Know nothing about from Wallace to Wardner. Think we were a little late at Wallace. All I could go by was the register. It is kept in the office. We report our arrival and departure. Was busy and do not remember looking at my watch. Suppose that register is in Wallace. Could not tell exactly without that what time we arrived there. That register is required by the rules of the company to be kept. I judge we reached Wallace about 11:20 or 11:30. I registered the time at 11:45, I think the register shows. I did not register until we came back from Wardner. That was probably five hours after the time we left Wallace. I did not get into the office at all in the morning. I would not be sure about the ac-

curacy of the register. I could not say within a few minutes.

Redirect Examination.

Was not delayed by any other cause except those men compelling us to back up to the powder-house. Barring that stop, we would have got into Wallace on time. Their time is slow. We have an hour to make the run.

Recross-Examination.

We backed up there for freight and took freight. I did not have any bill for it. We were delayed in consequence of taking on that freight. I did not deliver it. Did not receive the freight and did not consider I had any right to hold it. There are cases where we are late and still go in on time.

Testimony of Thomas Chester.

Have resided at Wallace pretty near two years. Have been engaged in railroading in different departments during that time. Am now brakeman for the Northern Pacific. Worked in that capacity near four months to the time of this trouble. Was working for this company on the 29th of April. That morning, going from Wallace to Burke, there was nothing unusual. Leaving Burke we had an unusual number of passengers. Did not notice anything unusual until we got to Mace. There I noticed that some of the men boarding the train had arms and a few were masked. Came on down to Black Bear. Stopped there. Looked back to see if any passengers were getting on. Could not see any. Looked ahead and they were loading power on the train at the

powder-house. Stopped there five minutes or so. Then we pulled down to Frisco. Had some cars to pick up there. Picked them up and pulled into Gem. There were an unusual number of men there. Quite a number masked and armed. We were delayed a considerable time. Judge about twenty minutes. Received instructions from the conductor that we were going back to the powder-house. Backed up there and stayed five minutes more. Pulled back to Gem, stopped a few minutes and then pulled down to Wallace. At the junction switch quite a number of men boarded the train, apparently coming from Mullan. Some of those men were armed. Did not notice any masked. Stopped at Wallace a little time and finally pulled out without our conductor and came down to Wardner. Did no flagging that day. Was on the hind end. I did flag the O. R. & N. passenger train after we reached there. Saw some one flagging, going around the curves from Wallace to Wardner. Could not see who it was. That is a mixed train that runs from Wallace to Burke, consisting of passenger and freight equipment and carries mail twice a day both ways, except Sundays, once. It is a regular train and carries United States mail. On the morning trip we have no messenger on, and the conductor and myself generally takes charge of the mail. Afternoons we have a messenger who takes care of it. The mail was on board in the morning coming from Burke to Wallace. It was in the baggage-car in my charge. I took it off at Gem and put on the Gem mail and took it off at Wallace; took off the Burke mail at Wallace. That mail is in a regular mail-pouch. It was on the train at the time we stopped

at Gem and backed up to the powder-house. At Wardner I flagged the O. R. & N. train coming toward Spokane. I went back on the train that night. Saw a large number of masked men on the train from Wardner to Wallace. I should judge there were about eight hundred men on that train from Wallace to Wardner. It stopped five or six times going down between those places. Several stops were made on account of flagging around curves, and others to pick men up. About a mile out of Wardner they started picking men up, all along at intervals. Some of those men had guns; did not notice any masks.

Testimony of L. W. Hutton

Residence, Wallace; occupation, locomotive engineer. Am working for the Northern Pacific and have been almost continuously since 1882, excepting one year. I run between Wallace and Burke. Have been on that run about six years and a half, and was on that run on the 29th of April last in the capacity of engineer. The train was a mixed train, passenger and freight. We are due to leave Wallace at 8:45 in the morning and left there that morning on time. At Burke saw an unusual crowd of men there. We had some switching to do. Have to back up from Burke because there is no place to turn. Did the switching and backed down to the depot. Saw a number of men getting on the coach, on the box-cars and different places. We backed down two or three hundred yards, where there is a little sidetrack, where we left the train on the main line; then we take the engine around the train, couple on and go back to Wallace.

Run around the train and coupled up. Olmsted stood at the front pilot and said, "Wait a minute until I collect fare of some of these fellows in the box-cars." Just about that time two men climbed into the cab, with masks on and with guns. The boiler extends back into the cab almost the entire length. I can look over it and see a person's face. These persons looked over the boiler at me. They said, "We want you to go right away; we have no time to wait." In about a minute Olmsted was ready to go and we pulled out. Before we had gone a hundred yards one of the men came around to the cab and said, "Did you get orders to go to the powder-house?" I said "No." He said, "You likely will," and walked out around to the tank. When I pulled out five or six got on the coal with masks and guns. Had not gone half a mile until one went into the cab with a gun and mask on and said, "We want you to stop at that powder-house, Frisco powder-house." I said, "All right." Backed down to the Standard. Quite a crowd got on. Black Bear is about a mile from the Standard. I got within 200 yards of the powder-house, and was going right along when some fellow knocked at the cab window in front. He came over the running board alongside the boiler. I loosened the catch. He was a man with a big, black mask on and pointed a very large revolver at me, right at my breast, and said, "I want you to go up to that powder-house." I said, "Certainly, I will go to the powder-house but put that down; I cannot handle an engine with a gun pointed at me." Another fellow standing there made him put it down. I stopped at the powder-house, which is on a curve on the opposite side of the track from the

engine I was on. Stayed there a little while until they was ready to go. Pulled down to the Frisco. Stayed there a minute or so. Some men got on. Pulled down a hundred yards below that; picked up some cars; done some switching at the Frisco; put on three cars of Black Bear ore; pulled down to Gem. Don't know how long we stayed there. A fellow says to me, "You have got to go back to that powder-house," and the next thing the conductor came to me and says, "You have got to go back to the powder-house; can you go up?" I pulled up to the powder-house. Was there a short time. Pulled back to Gem. They said, "We have not got cars enough for the crowd; have to get cars." Backed down a hundred yards below there and picked up three box-cars from the Gem track. Came back, coupled on to train. After leaving Gem one man said to me, "Now, this train is going right through to Wardner." I says, "We cannot go to Wardner. The Northern Pacific track only runs to Wallace." "It don't make any difference, you have got to go," he says. I said, "We cannot run over the O. R. & N. track. Here is a 115 ton engine." "Don't make any difference, you have got to go to Wardner," he says; so I pulled down to the switch where connect on the main line, about half a mile east of Wallace, and stopped there. Saw quite a crowd of men getting on there. They told me to stop at the O. R. & N. depot, and they said they went over and tried to get orders to go down there. They came back. Some of them says, "We cannot get no orders." Backed down to the Northern depot and stayed there quite awhile. Everything was in confusion; men sitting on the tank there giving me more

orders in about ten minutes than I ever received before. At last a man with a gun said, "It is time to go now; there is no more fooling." Just then Mike Walsh, the head brakeman, came along, and I said, "Mike Walsh, you get on this engine and stay here; this train has got to go to Wardner; no getting out of it. This train has got to be protected. You have got to flag it." They kept at me so strong that I pulled out. Stopped at the O. R. & N. tank and took water. They did not want me to. I told Walsh he had to flag the train on the curves. I think we flagged on five different curves. Used an hour and twenty minutes from the time we left Wallace until we got to Wardner, about 11 miles. Got there just at one o'clock by my time. There was so many cars on the side track we could not get on there, and the O. R. & N. passenger train came along and they went by us on the side track. Nothing was done until after the arrival of the second engine, which arrived from Wallace about 20 minutes after us, and then I saw a gang form in line, and a lot of men with masks and arms and Winchester rifles. They marched along pretty close to the engine, and turned and went around the wagon road, which comes down about a hundred yards to the south of where we stood, and marched to the Bunker Hill and Sullivan Mill. I sat on the engine; saw a lot of shooting there toward the side hill. Saw a gang of 75 to 100 men marching down the track, each man with a box of powder on his shoulder, and a lot of other men went down there. From the time we went down until we started back, it must have been two hours and a half or three hours. The gang came back, got on the train, and said they were

ready to go. Olmsted said he had been to the depot and had been notified that the track was clear to Wallace. Coupled the two engines on to the train, one on the head end and one on the hind end, and went back to Wallace and from there to Burke. Going down Charley Garrett, one of the defendants, an old railroad man, flagged around the second curve going down. Stopped four or five times about the head of the Bunker Hill and Sullivan flume. That is about a mile and a quarter above Wardner. The fellows on the tank would say, "Here is a gang; stop and pick them up." There was three or four stops made within a half a mile. Some of them men picked up were masked and armed and two or three had bundles. Saw a couple, just before we came to them, have a bundle and, I think, they took a handkerchief out of the bundle and made a mask and put it on. Started back from Wardner about 3:30. Don't know whether the conductor ordered me to pull out from Wardner or the gang. Some were armed and masked. As we pulled out I was talking with J. R. Sovereign, who had come down there. He rode back on the engine. Got no orders from the man Garrett. After we had got about a half mile coming back heard four or five men hallooing to stop. Looked around and saw Charley Garrett and a number of men with masks on. One with a Winchester said, "Stop, there is a lot of armed men left." We stopped and backed up possibly a quarter of a mile and there was 6 or 8 men left. I would not say positively that Garrett hallooed to stop. He was the only one besides me and Sovereign that did not have a mask on. I did not ask him to flag. Gem is

in Shoshone county, State of Idaho. This run between Wallace and Burke was in Shoshone county.

Cross-Examination.

There must have been six or eight persons shouted "Stop." Would not undertake to distinguish Garrett's voice from the rest. On our return to Wallace we stopped there and did some switching and then went on to Burke. Was not compelled to do that switching by these men. That was railroad business. There was freight to go to Burke. Reached Wallace about 4:30 and Burke at 6:15. Was about 30 minutes late at Burke. Switched 30 or 40 minutes at Wallace. It must have been about 40 minutes. We could have left Wallace on time that evening and would have been on time at Burke if it had not been for the switching at Wallace. Garrett was not masked, had no arms, was dressed ordinarily. There was about 1 man armed to 5 that were not—about that proportion. Know Jake Bloom, who testified here. Have known him six or eight years. Did not see him on that train. Could not identify anyone. Was not off the engine that day but twice. Have a watch that is supposed to be correct. If it varies 30 seconds a week it is condemned by the Northern Pacific inspector. Had that watch on that day. Consulted it at Wallace. Reached Wallace, as near as I can tell, at 11:18, not later than 11:20. It might have been 11:15. Left Burke at 10 o'clock on time. We are due to arrive at Wallace at 11 o'clock. Reached Wardner at 1 o'clock by my watch. 12 o'clock by O. R. & N. time. Think the O. R. & N. train must have been 20 or 25 minutes late when they reached

Wardner. It was late in arriving there. We shoved up on the main line and let them head in on the side track and let them by. Cannot say how much that delay was.

Redirect Examination.

Always stop at the switch above Wallace coming down from Burke. After we left Wardner and got near Wallace saw a number throwing masks or something off the cars. I was on the hind end of the train. As a rough guess, I would say there were 1,000 men on the train when we pulled into Wardner station. We picked up 100 or 150 above Wardner.

Recross-Examination.

All those men were not armed. Saw men throw off pieces of cloth. Might have been a hundred or more.

Testimony of A. W. Pearley.

Reside at Tekoa; occupation, locomotive engineer. Work for the Oregon Railway and Navigation Company. Have worked for that company about 15 years. Present run is from Tekoa to Wallace and return. Run a passenger train. Was engaged in the same business in same capacity during month of April, and run passenger train from Tekoa to Wallace on the 29th of April last. Left Tekoa approximately on time. Could not say we left there exactly on time. Are due to leave Tekoa at 9:35. Due in Wardner at 12:35. Could not say whether we reached Wardner on time. We are frequently late there. We were delayed that day going by. The main line was

blocked. There was a train standing on the main line, near the depot. Pulled up as close to that train as I could. Noticed the order board turned. Got off; went into the office to see what the orders were. Stopped there about half an hour. Ordinarily stop there eight or ten minutes, sometimes longer. Usually have lots of loading and unloading there. It was a Northern Pacific train on the main line. We took the side track and they run up on the main line past us. They told me in the office there was a light engine coming from Wallace and we would have to remain there until it arrived. We were about thirty minutes altogether there, and ten minutes is the usual stop. After we got by this train and light engine went to Wallace. Left Wallace at 2 o'clock —our regular time. Train is due in Wardner at 2:25. Arrived a mile the other side of Wardner on time. We could have got to Wardner on time. A number of men gave us a signal to stop. The track was not blocked, that I could see. We stopped and I asked a fellow what was the matter and he said he did not know. We stood there. Was delayed about 55 minutes or an hour at Wardner and this other stop. Don't know who stopped us. None of the men who stopped the train were armed or masked. Mr. Chester, the Northern Pacific brakeman, was out there. I did not see him until after I got stopped. He got on the engine and said he was flagging us, and they called him in by four whistles, and that showed us we could come down to Wardner. Went in on the side track there. There was three trains there; two engines. This Northern Pacific train was still on the main line. It was that train that blocked us in going by. The train

I was on consisted of a combination car—there was a mail-car—baggage-car and combination smoker, and first class, *and first class.* Do not think we got to Wardner going up on time. This was in Wardner, Shoshone county, Idaho.

Cross-Examination.

We were frequently late out of Tekoa and I could not swear we got to Wardner on time on the 29th of April. We were late at Wallace. Could not say how much. Know we left there on time. Do not think that more than 20 minutes of the delay at Wardner going up was due to the train on the main line. Lost about 5 minutes going to the office for orders. The delay due to all causes 30 minutes. Do not think there were any cars on my train specially designated by signs or marks or writing of any kind as a mail-car. We have a car now with "United States Mail" printed on it, but prior to April 29th that was not the case.

Testimony of Robert Jell.

Reside at Tekoa, Whitman county, Washington. Occupation, railroad man. Am a conductor for the O. R. & N. Company. Have been acting in that capacity about nine years. Was conductor on this road on the 29th of last April on a passenger train. We are due to leave Tekoa at 9:35. My run is between Tekoa and Wallace. There was about 30 minutes' delay at Wardner, about 20 of which will be charged up to the main line being blocked by the Northern Pacific train. They backed up and I took the side track, and then pulled by them. Then

went up to Wallace. Must have been 30 minutes late in Wallace. We are due to leave Wallace coming back at 2 o'clock. Left there on time. Got within about a mile of Wardner on time. Our train was stopped by a lot of men. Don't know who stopped it. Was in the train, and when I came out there was a crowd of men in front of the train, and don't know whether they flagged it or not. There was no obstruction on the main line at that point. The Northern Pacific train had the main line when I pulled down to the depot. We were delayed there by reason of that train being there about 55 minutes. Do not know how late we were into Tekoa that day.

Cross-Examination.

I backed in on the side track. The engineer, I presume, handled the other train. Did not see any conductor. I think going up I requested him to move the train and he did so. Nobody interfered with him that I know of. He could have moved as well before we came, if he had been desirous of getting out of the way, as when he did move. We carry a mail-car, a smoking-car and a first-class coach.

Testimony of George K. Marshall.

Reside at Tekoa. Am a railway postal clerk. Have occupied that position about seven months. My route is between Wallace and Tekoa. Was on that route on April 29th last. Was on the train that stopped at Wardner. I only noted the delay at the terminal. It was 25.

(In Response to Questions by Mr. REDDY:)

I have a register. It is required to be kept by the rules and regulations of the postal department. I kept it in accordance with the rule.

Direct Examination (Continued).

The United States mails were on this train at the time of the delay, going up. Mail for all those postoffices in the vicinity, Wallace and points above. Coming back the delay was about an hour and ten minutes. Could not tell exactly. The United States mail was on board at time in my charge.

Testimony of Katie McLoughlin.

Reside at Wardner. Have lived there about four years. Live on the road going from Wardner to Kellogg. Wardner is about a mile and a half from Kellogg. I seen a number of men on the morning of the 29th of April going down with their bundles. There was different squads, ten or six in a gang; passed my house. I know a few of them. Some I did not know. They had newspaper wrapped around the packages. Did not notice anything that would serve as a mark of identification of these men. It must have been ten o'clock.

Testimony of Hattie Simons.

Reside at Kellogg, Idaho. Have lived there about four years. Was there the 29th of April last. Live just below the depot. Saw some trains come down from Wallace, and quite a number of masked and armed men

came in town and some of them went on the main road to the mill, and part of them collected and masked in front of our place. Saw them put on masks. They were about 25 feet from our place, some of them. Did not know any of them. Live between the depot and the Bunker Hill Mill. Did not see any men with bundles that day. Heard orders for Wardner ahead, and then for Burke. There was a crowd of men went ahead of the gang that stood there in order, and they started down the track, and some one gave the order to go back and get the powder. They got the powder and started to the mill. Saw them go back and get the powder. Got it about a hundred yards from our place at the crossing. Had it piled there. Saw white ribbons or rags on them.

Testimony of George A. Smith.

Am commonly called Gus Smith. Have resided at Wardner about three months. Was there on the 29th of last April. Prospecting and miner is my business. I had been arrested previous to that day, and they brought me in from where I belonged. My sister ran a boarding-house, the Bunker Hill. Was about to go back to the hills again. Sister wanted me to stay with her, on account of the strike. Nobody there but herself, and four children to look after. This was four days, probably, before the 29th. On the 29th the report was that the men had gone to work in the Last Chance. Supposed the strike was over. On morning of 29th left the boarding-house and went up to see what was going on. Went up road and when I got in front of Hyde's store saw 20 or

30 men with bundles under their arms. Followed those men. They went down the road going to Wallace. Turned a curve there that is pretty sudden and went ahead of me quite a ways. They walked pretty fast, and when I turned a curve saw this train coming with men all over it. Those men got aboard the train. Stood there, and a tall man with a black mask said, "Jump on." Said, "I can't, have a dog here; what will I do with him?" He said, "Throw him on." Threw the dog on and got in. Went to Wardner and everybody got out. Broke away from the crowd and started for the boarding-house. Five or six men broke away from the crowd and went to a place called Kellogg's house and stopped there to guard. They asked me what I wanted. Told them I had a family around there and wanted to get them out. They said, "All right; you can go down and get them. Stop and knock at those other two doors." There are two houses by the side of the mill. Stopped and knocked but they were gone. Got ahead of the men and come back with the children. Went and got my sister and other two children and met twenty-five men coming to the mill, masked and armed. They asked me if there was anybody in the mill. I told them not as I knew of. Went to a place called Bussey's store, and then about 200 men marched past me with rifles and masks on. Started back to the mill. Crowd stopped me and asked if I had any more family. Said "No." They would not let me pass. Shooting commenced on the hill. Stopped and looked at that. Went up the track and into the boarding-house.

Testimony of W. H. Pipes.

Reside at Kellogg; occupation, stationary engineer. Lived at Kellogg on 29th of April last. Worked part of that day. Quit work because understood there was to be trouble. Saw a train loaded with men come in from Wallace that morning. It arrived about 12 o'clock. Was standing on the roof of a new house that was being built for M. J. Sinclair. Saw train stop before it reached the station. Could not see what occasioned the stop. Saw no men board the train. Saw quite a crowd of armed and masked men on train as it was pulling in and saw armed and masked men afterward. Train stopped at depot first and then pulled down a short distance below the depot and a great number of men got out at what is known as the Kellogg turn. Short time after arriving a party of 20 or 25 men, masked and armed, marched toward the mill. Shortly after 150 to 200 masked and armed men marched toward the mill. Heard orders given to bring on powder. Don't know parties who gave that order. They were on railroad and I was held a prisoner on wagon road by five masked and armed men. Did not recognize any of those men.

Testimony of James Pipes.

Live at Kellogg; business, carpenter. Lived there since November last. Was there on April 29th last. Saw train carrying large body of men come into Wardner that day about 5 minutes of twelve o'clock. Was on the roof of M. J. Sinclair's house. Looked as if men were getting on train above station. Could see them moving

on sides of train next to flume. After train come in saw them unloading powder. Saw a number of men go up on the hillside. Also saw between 150 and 200 march down the road, cross the bridge over the flume, and go down toward the Bunker Hill mill. Men were dressed with coats turned wrong side out, masked, and every way to disguise them. Some were not masked. Some had stars and stripes for masks and some had white cloths, some dirty cloths; others with white strings in their button holes; white strings tied around their arms. Saw them unloading powder; carrying it down toward Bunker Hill mill. Was on the wagon road just above Kellogg's barn, under guard of five armed and masked men. They told us to stay with them. Was under guard about an hour. Did not recognize any of the men in that part of the crowd.

Testimony of Mrs. Tony Tubbs.

Reside in Wardner. Was there on April 29th last. Was at different places that day. Was up town first. Later was down near Kellogg. Still later was at Kellogg. Quite early in morning saw crowds of men, in bunches of 2, 4 and 6, go down the street toward the station. Most of them were carrying bundles, some had guns. Afterward went in thatdirection and saw still more. Asked a man I knew what he had under his arm. He said it was none of my business. Said he was going to leave town. I said he should have left before. He said it none of my business when he left. Afterward saw two I knew quite well. Asked what he had under his arms. One of them said, "Just wait a few minutes and there will be

much in sight," and the other said about the same. The first one was Chris. Lenecke, and the other two were Frank Hart, and a boy named Steve. I only knew him by his first name. The last two were members of the union, because they told my husband they were; one of them did in my presence. Saw Chris. Lenecke frequently the union hall, and saw him with the crowd that came to the boarding-house both times. He was with those men all the time. Saw about 200 men going toward the junction with bundles. Perhaps a dozen or less had arms. Saw a great number of men around the station. Was ordered away from there by some masked men. Afterward met a body of about 140. They were all masked and armed except one. They were going toward the mill. Heard no orders from those men given that day. Heard exclamations as they passed, "It is off with Wardner"; "Wardner now or never"; "Swedes are as good as the Irish"; "Some Dutch are all right," and few things like that. Did not recognize any of the men who were armed or masked.

Testimony of Ed. Booth.

Reside at Kellogg. Am constable of that precinct. Was there April 29th last. The first unusual movement of men that day was the men going up the O. R. & N. track toward Wallace and along the Wallace road. Saw about 30, as a rough estimate, going up. Could not say exactly. Saw none of them carrying anything, except one man who was near Mason's barn that had a rifle, and another man near the Wallace road that had a gun. Do not know who those men were. There is two roads

that run from Wardner after you get down to Draught's store. Just below that store the right-hand road runs around the hill and up on the railroad and goes to Wallace. The left-hand road goes to the junction down at Kellogg. Coming from Wardner to go to the junction you would take the left-hand road. Going to Wallace would take the right-hand. Saw the train come in. Was just above Northern Pacific depot on the edge of the hill. Was about 450 yards from the depot where the train pulled in. Saw them unload the powder from that train close to the hand-car house, at what is known as the crossing at the lumber yard. Was over a quarter of a mile away when I saw them unloading the powder. Am acquainted with Louis Salla. Did not see him on that day. Am acquainted with Henry Maroni. Saw him that day going up the O. R. & N. track, just above the Union Pacific depot. He was at the culvert where the stemwinder switch is. He was not carrying any. That was probably thirty minutes before the train came in. At first he was alone. When he got up the track a piece a man hallooed to him, and he stopped and waited for him to catch up. Did not see Maroni again that day. Know Lucinetti. Saw him that day. He had a velocipede hand-car and took it from the Union Pacific track over and put it on the "Y" of the Northern Pacific. Talked with him as he was taking the car over. Later saw him coming from his cabin across the bridge. He had a gun with him crossing the bridge coming back. That was probably five minutes before the train came in. He was going toward the Union Pacific depot. Coming from the old junction. Not going toward Wallace. Could not tell what kind of a gun it was.

Cross-Examination.

Am well acquainted with John Lucinetti. Was probably 300 yards from him at the time I saw him with the gun. He was alone. He was going from his cabin toward the junction. He lived down in what is known as Bullion Gulch. I was standing above the Northern Pacific depot on the point of the hill. I was keeping out of the way. Had been warned to keep out of the way. Was standing at that point when the train came in. Was in Abinola's saloon that day along in the morning. It must have been 40 or 50 minutes before the train came in. Could hear the train when I left the Union Pacific depot the last time. It was on the road somewhere in the neighborhood of Elk creek. Could hear it about 10 minutes before it arrived. Was not in the saloon when I first heard the noise of the train. Was in that saloon twice that morning. Think it was more than half an hour before the arrival of the train that I was in there the last visit. Had not purchased a glass of beer when the noise of the train was first heard. Had a glass of beer an hour or so before it came. I drank the beer. It is not a fact that when the noise of the train was first heard I was in Abinola's saloon, in Kellogg; that I called for a glass of beer; that it was set out to me on the counter in the presence of several men, the bartender being one; that when I heard the noise of the train I remarked that the train was coming, and left the beer standing on the counter, and left the saloon and immediately went into the hills away from town. I went on that point where I claim I went. It is right on the edge of town.

It is just across the river, about 450 yards. Stayed there probably two hours. Started over there between 5 and 10 minutes before the arrival of the train. Went alone. Took no provisions, horse or carriage of any kind. Nobody came there to molest me. Might have been alone there an hour. Returned to Kellogg after the train pulled out. Stood where I could down on the train. Saw Lucinetti after I left the depot, after the train was in hearing; when I saw the train was at Sam Brown's place. Saw him after I crossed the river. Between Lucinetti's cabin and the place where I stood there is a little building on the right-hand side of the Northern Pacific track, as we go down. On the left-hand side there is Capt. Hill's house and Mr. Rutter's house. There would be one place he would have to pass out of sight of me, on account of what is known as the "Hall," at the junction, and some other buildings. There is nothing to obstruct my view from where I stood on a line to his cabin. There is things all around to conceal yourself where I stood, if you wanted to. Went over there because I was afraid of personal injury. Going there took me out of danger. Could be seen at that point from the depot if I had moved around. Was standing up. Anybody that came to that train could not see me as far as I could see Mr. Lucinetti. Lucinetti could not have as good a view of me as I of him, because there was timber behind me. He could see me if he were to look for me. There was nothing to obstruct the view of anybody standing around in that vicinity. The parties on the train did not see me. I chose a place where they could not see me easily. I wanted to keep out of the way. They passed me unob-

served. Have been a constable two years. Have been a detective in my time, about three years. Was a witness on the trial held by his Honor at Coeur d'Alene City in 1892. Testified there that I was a detective. Did not testify there that I had attended some institution to learn the business. Have mined some and worked in the Bunker Hill, three years ago. Worked in the blacksmith shop of the Bunker Hill last winter and a year ago last winter. Left the Bunker Hill on the first day of April of this year. There was no one with Lucinetti at the time I saw him with a gun in his hand. From where I was could see his cabin door. Saw him come out of the door and come up the road. Could not tell what kind of a gun it was. Know that a number of men were sent up to the Last Chance with arms to protect that property. Don't know whether Lucinetti was one of them. Could see the depot platform from where I was. Before the train arrived there was very few men in any direction. Everybody was up the track toward where the train was coming from. Saw the train before I saw Lucinetti. It was at Sam Brown's place. Stopped there. That would be over half a mile from where I was. Did not stay there to stop the trouble, because I had been warned I would have two bullet-holes in my back at night. Was also told they would like to see me tied on the mill when it was blown up that day.

Testimony of James M. Porter.

Reside at Spokane, Washington. Am a civil and mining engineer. Was in Wardner, Idaho, the 29th of last April. Was at the depot that day when the train came

in with the armed and masked men. Saw the train come in and the men get off. Saw Louis Salla and Louis P. Larson get off that train. One was masked and armed and the other was not. As the train stopped Salla jumped from a box-car and landed on the platform. As he started to walk toward the depot he pushed his mask up and rubbed his face and looked around. He had his gun in his right hand. I caught sight of the spot on his face there, in that way. Recognized him by the mark on his face. Did not notice the gun particularly. It was a rifle of some kind. Saw men getting on that train at different points above the station. Saw 150 getting on, I should judge. Some appeared to have guns.

Cross-Examination.

I was a resident of Spokane prior to April 29th—you may say all of this year. Prior to that I lived in Wallace, Idaho, since 1889. Have been at different times in the employ of the Bunker Hill and Sullivan. During part of April last was in the employ of that company. Do more work in the Coeur d'Alene district than any other. Reached the depot that morning a little before 12. Had known Salla by sight for several years. He worked around the mines in Wardner. He has a ranch near Harrison. That is west of Wardner about 30 or 40 miles. Presume his residence was where his ranch was, but he has been working around Wardner more or less for several years. Think I had seen him within a month prior to the 29th of April. He usually boarded at Page's hotel and I saw him frequently. Made no note of the time. Was told this morning he was married a short time be-

fore that. Don't know whether he was keeping house. His mask was a rag of some kind hanging over his face, fastened to his hat. Do not remember the color. Think it was a dirty white. Had pretty much the same kind of a coat he has on now, and a slouch hat. Think he had overalls on. Don't remember as to his shirt. Did not examine his clothing carefully, because his face was familiar and I caught sight of that for a short time. The mask covered all his face. Would hang down just about around the shoulders. Fastened around the hat. Am not sure whether the hat was over the mask. It would extend to the hat. The mask was tied. They were most all just hanging down loose, and if it had been tied around his neck he could not have pushed it up as easily as he did. In rubbing his face around that way it raised the mask. Rubbed it with his hand. The mask dropped down again when he took his hand down again. The mask was up only a few moments. As he rubbed his face he looked around over the platform in front of the depot. There was a number of men getting off the train. I was 15 or 20 feet away from him. Nobody between us. He was among the first who got off the train. I was standing in the telegraph office at the window. I was inside, he outside. I looked through the glass. Did not see him raise the mask a second time. He moved away from there after that. It was not very warm weather. Could see whether he was perspiring—if there was any reason for his raising his mask and wiping his face. Sometimes a man rubs his face without perspiration. The flies were not bad at that time. Possibly the mask tickled his face. Could not measure the time in any way.

It is a face no one would take for another. I have reference to the mark. From the way the men were armed and all the circumstances I was satisfied there was some trouble on hand. The object I had in view in being there was to identify some one. Could not describe the hat Mr. Salla wore any closer. It was a slouch hat, a dark hat. I was not up town the 28th of April. It would have been necessary for him to have left town and gone up toward Wallace to get on that train. Was looking around for others I might recognize. Saw Louis P. Larson. He was not masked. Those people had some mark or another; either masked or a white rag tied around the arm, or upon the clothes. Saw Gus Smith get off the train. He had something around his arm. Saw Hutton, the engineer on the train. Spoke to him on the platform. Do not think he had it on. I did not put any on.

Redirect Examination.

Did not notice any ribbon on Salla. The masks seemed to take the place of the ribbon or the ribbon of the mask.

Recross-Examination.

That is my conclusion from what I saw.

Testimony of A. S. Crawford.

Miner; reside at Kellogg, Idaho. Have lived there about fourteen months. Was there the 29th of last April. Saw a train come in from the direction of Wallace with a crowd of armed and masked men on it. The train stopped several times from the time I first saw it from

the platform, but did not see anybody get on. When they got to the station the men got off. A good many of them had their coats turned inside out. Quite a large number had masks on and a large number had rifles. There was more that had masks than had rifles. Recognized only two men who got off that train. One man I know, that is the ex-sheriff, and a man I did not know. That gentleman there (indicating defendant P. F. O'Donnell), he had no hat. He had a cotton handkerchief over his head. It was a large cotton handkerchief, and he had some means of looking through it. He wore no whiskers at that time, but a long mustache, longer than he wears now. I stood on the platform until the train backed up, and he was close by me. When the train backed up the passenger came in, and as soon as the passengers went by *O* left the platform and went over to the postoffice, and this gentleman went over when I did. He took the handkerchief off, and when I came out of the postoffice was trying the hat on. He got off the train pretty well up toward the locomotive. Think he got off the car next to it, but ain't positive. Did not see him after he left the postoffice.

Cross-Examination.

That was the first time I saw Mr. O'Donnell. He must have stood on the platform by me, I should think, 20 minutes. There was nothing else peculiar about him except he had no hat. I could not look into his face until he got over to the postoffice. I did then. Looked at him in the postoffice, thinking I would know the gentleman when I met him again. He had on dark clothes. There

was nothing peculiar about his dress. The only thing noticeable was that he had no hat and his head was covered with a handkerchief and he had no gun. There is a little store in front of the postoffice, and he was trying on the hat when I left. I was there just long enough to get my mail; two or three minutes, probably. He was wearing no whiskers at that time. Had a long mustache and I noticed that bald spot on his head. That is pretty common nowadays. Do not pretend to identify him by the bald spot. Am interested in the Coeur d'Alene Mining and Milling Company. That is east of the Bunker Hill about a mile and a half. Disclosed the fact of my identification of Mr. O'Donnell the first or second day after the arrests were made and they were in the prison yard down below. Gave testimony before the coroner's inquest. Think Mr. O'Donnell had on dark clothes. Don't think he had an overcoat on. Do not recollect about the man's dress. He might have switched some other hat with some other man on the platform, and some other man put the handkerchief over his head. I could not say that. Did not watch the man enough on the platform to know he did not change handkerchiefs with somebody else. Had no special reason for keeping him in view. There were others much more conspicuous by their dress and masking and arms. My attention was from time to time distracted. He was trying the hat on when I left the place. He was in my view altogether, I should say, six or seven minutes.

Testimony of M. J. Sinclair.

Residence is Wardner. Follow mining. Have lived there 12 or 13 years. Was in Kellogg on the 29th of last April. In the morning, about half-past ten, I had occasion to go to Wardner, and on my way there I met parties coming down with guns, and some of them had little bundles under their arms. I noticed they made for a wood-pile in the town of Kellogg, back of Mrs. Mason's residence. Stood there perhaps ten minutes watching the parties coming down in twos and fours and congregating over there. Continued on, and on the way up met more men coming down. Attended to my commissions in Wardner and returned back. Got into the town of Kellogg about Hyde's store. Looked up the track, heard a train whistle, and saw it coming down. On top of the box-cars there were a great many men, and a number of men were in the act of boarding the train coming from the direction of this wood-pile, marching over from that direction. Continued on, and while I was at the postoffice the train pulled in. A good many of these men got off the train, came in the postoffice and mingled around. Some were going to the hotel to get meals, and others were around the country in little groups. Some were masked and some unmasked. Some had guns and were not masked, and a good many had little badges or handkerchiefs tied around their arms. Was around Kellogg that afternoon. Heard an order given, somebody called out, "Wardner to the front," shortly after I left the postoffice. A good many men fell into line, nearly all of them masked and had guns. A few marched on behind that

had neither guns or masks. Heard a lot of them yell, "Down with America" every time there was an explosion, when I was a prisoner. Was going over a piece of ground that belonged to me and my brother and was ordered to fall into line. They held me up and said, "Fall back in there." There was another man with me at the time. Am acquainted with Francis Butler. Have known him two or three years. Saw him on the 29th of April, in the morning, on my way to Wardner. He came down the road with this crowd of men. Met him about half way between Wardner and Kellogg. He was with a man named Morris Flynn. He had a little package. He always dresses up pretty nicely and wears glasses, and I took particular notice of him. That was between ten and eleven in the morning. Saw him again in the postoffice at noon. Just after the train pulled in I fell into line waiting for the mail, and my wife came over and nudged me and I looked around and saw Butler right back of my shoulder. Saw him again after the mill was blown up. He looked quite a bit changed. He had an ulster on, but it was torn quite badly and his face was dirty. He did not look as neat as he did in the morning or at noon. Know the defendant Albinola. Have known him three, four, or five years. Saw him that day. He was marching in the crowd of Wardner men that were masked with guns. He had a gun. That was about the same time of day. Immediately after the order had been given for Wardner men to go to the front. He was marching with the Wardner contingent. He had no mask. He was about sixty or seventy feet from me.

Cross-Examination.

Reached Wardner between eleven and twelve, should judge. On the way met Butler and Flynn. Don't know how Butler was dressed. Know he wore glasses and had a standing collar, I think. More than that could not tell. Was as near to him as I am to you. Identified him by his person, not by his clothes. Think a standing collar is an unusual thing for men to wear in that section of the country. Sometimes wear one myself. Don't know that I ever met Butler when he did not have a standing collar. He almost always wore one. Did not pay much attention to him. Had no occasion to. It came to me afterward. He was going toward the junction. I was coming from there. He carried a bundle wrapped up in paper—a newspaper, I think. Am quite sure Flynn did not carry anything. Nothing peculiar about either of them. Spoke to Flynn as I passed them. He had no ulster on at that time. If it was wrapped very tight that package might hold the ulster, but don't think it would. Did not notice it particularly. Just noticed that it was a common bundle wrapped in a piece of newspaper. Could not say whether it contained an ulster. Haven't the slightest idea. Met them about a half or three-quarters of a mile from the station. Did not see Flynn later in the day. Butler did not have the ulster on the next time I saw him at the postoffice. Do not think he had a bundle then. Saw him next after the blow-up of the mill. After the train was pulling out going back to Canyon creek. He had the ulster on then. That was the only time I saw him with the ulster. Did not notice where

he went after that. Did not see him join the Wardner forces under that order. Saw Albinola the first and only time when he was marching in the Wardner contingent. He was not masked, but had a gun. He was pretty well in the middle of the procession. A party of us standing at the fence, talking who was in the crowd, and when one saw any one we knew we would say there goes so and so. In that way Albinola's name was brought up. Mrs. Rogers, Mrs. Pettitt, Miss Gilbert, Mrs. Sinclair, and quite a number of them were in that crowd. Was not over 50 or 75 feet from the procession when I identified Albinola. There was nothing between me and the line of march. Forget whether it was dusty. Could not tell what Albinola wore. Not a thing about him. Identified him by his features, his shape and his person. There was no change that I noticed in Butler's dress from the time I saw him in the morning until I saw him at the post-office. Saw him somewhere about McKinniss' hotel after the crowd was coming up from the mill. He had an ulster on. Think it was an ulster Dennis O'Rourke used to wear. He was not masked. He was not masked at any of the times I saw him. My wife was with me when I saw him at the postoffice and again on our trip to Wardner. The two first occasions when I noticed Butler. Was never a county officer in Shoshone county. Was postmaster four years. Albinola had a long gun, either a rifle or a shotgun.

Testimony of G. A. Olmsted.

(Recalled by Plaintiff.)

The O. R. & N. also runs between Wallace and Burke. That company runs the same kind of a train as the North-

ern Pacific over those lines. It does not carry mail. The Northern Pacific has had the mail between those points for two or three years, possibly longer. No other train has carried the mails between those points since we have had the contract. The cars were not marked as railway mail-cars. We never used a regular mail-car up there since I have been on the run. We never used a car marked "U. S. Mail" on the outside.

Testimony of L. W. Hutton.

(Recalled by Plaintiff.)

The train I was engineer of carries a combination car. About two-thirds of it is partitioned off for seats and passengers. The back end is for baggage and mail. There is no mark on the outside of the train whatever, and has not been, to my knowledge, since they have carried the mail there. The Oregon Railway and Navigation Company does not carry mail between Wallace and Burke. The Northern Pacific is the only company that carries mail between those two points. Think for the last six years that has been the case. That is the only kind of a train that does carry mail.

Testimony of Martin Jasper.

Live at Kellogg, Idaho; am a millman at the Bunker Hill mill. Have lived there continuously since 1893. Worked the night shift at the mill on the 28th of April last. On the 29th I was at home. Live on what is known as the Wallace road, coming down from Wardner. Saw a number of men passing my place on the highway on the morning of the 29th. Some were carrying bun-

dles and some were not. Did not see any guns. They were going down toward the railroad in the direction of Wallace. Saw three or four going past first, and thought it was a funeral and went to sleep again. My wife called me about half-past ten and told me what was up, and I got up and went outside and saw quite a few go past, in a wagon some of them. Stayed home until near two o'clock, then went across the creek to Bussey's store, and saw quite a few men there, and all that I saw was masked and had guns. Stayed there perhaps ten minutes and went home again and stayed there until the explosion went off. After the last shot went off I went across again. Went back home and then went down the Wallace road. Afterward went to Bussey's store and down the road toward Wallace, and saw some men there coming back up. I know Dennis O'Rourke. Have known him about six years, ever since I have been in the Coeur d'Alenes. I saw him that day; the first time he was going toward Wallace. The next time I saw him coming up the same way. In going from Wardner to the depot they would not go by my place. They would turn off to the left, but in going to Wallace they turn off to the right and go by my house. Saw him going down that road and coming back. Saw masks that day down in that direction, but did not see any on O'Rourke. Found 30 or 40 masks laying all over the bottom and on two wood-piles there; stuck all over the wood-piles; stuck in the wood; close to the highway, three or four hundred yards from the railway track, maybe five.

Cross-Examination.

There was a man with O'Rourke when I saw him. Do not know him, but seen him often. He was not masked or armed. Neither was masked or armed. Met them about a mile and a half from Wardner or a mile and three-quarters. It was right in Kellogg, to one side of the town there, about a quarter of a mile from the station. Saw O'Rourke three times that day. The first time I saw him he was about 150 yards farther away from the station than when I saw him the second time. The second time I saw him it was after two o'clock. The first time it was between seven and eleven o'clock. He was passing my house. I was in bed. Had been sleeping up to that time. Heard some men traveling past. My bed was standing alongside the window and the curtain was up. My wife did not call attention to the fact that parties were passing. Looked through the glass. O'Rourke was about 30 feet from me in the road. Could not say how he was dressed. Identified him by his face. Saw him about a minute. Was lying in bed. There was more than one with him, but I didn't recognize any of them. Did not try to recognize anyone. The second time I saw him he was returning toward Wardner. That was after two o'clock. I was 150 or 200 yards below my house. There was a man with him, but do not know his name. Did not notice O'Rourke's clothing. Could not say how he was dressed. The train had not left. It was ready to pull out. I heard the train coming in about twelve o'clock. Know John Lucinetti by sight. Did not see him that day, to my knowledge. Work at the Bunker

Hill, and have been working there pretty much for six years.

Testimony of Maggie Skinner.

Have resided at Kellogg, Idaho, about three years. Was there on the 29th of last April. We live between Kellogg and Wardner on what is known as the Wallace road. There was a good many men passed the house on the morning of the 29th, some armed and some masked. They were going on the Wallace road. Think seventy-five or a hundred. Have known Dennis O'Rourke off and on for over a year. Saw him pass by the house that day going out on the Wallace road. He was not carrying anything. Do not know who he was with. Did not see him at any other time that day. Do not know the defendant Francis Butler, but have seen him. He went by the house that day carrying a rifle wrapped up in an old overcoat. Don't know whether it was a mackintosh. That was between nine and twelve o'clock that day, before the train came in from Wallace. Do not know who he was with. Have seen the defendant Louis Salla before. He used to pass the house every day. Saw him on the 29th. He was carrying a package. Don't know what time of day, but before the train from Wallace came in that morning.

Cross-Examination.

Do not know where Mr. Salla lives. He was stopping for awhile about three blocks above us. Do not know where he was living on the 29th, or for quite a while before that. There was other gentlemen with him, but I don't know who they were. The other gentleman was not carrying a package. The package was rolled up

in a newspaper. It was not a very large package. Don't know how he was dressed. I was at my brother's. He passed that house. I was in the house. He was on the road. Saw him through the window. Was in the same place when I saw Mr. O'Rourke. He went down the same road. Did not notice how O'Rourke was dressed. Could not tell what sort of a hat he wore, or anything of that kind. There was some parties with him, but don't know who they were. Don't know how many there were. He was going from Wardner toward Wallace. Did not see him on his return. Should judge it was about an hour and a half before the train come in. Mr. Butler was not with Mr. O'Rourke. Think I saw Butler after I saw O'Rourke. Would not be positive. There were others with Butler, but did not know them. Neither Mr. O'Rourke or Mr. Butler was masked in any way. Saw Mr. Butler return after the mill went up. The train had not left. Don't know how long it was after the explosion. Did not see the train at the depot and don't know what time it came in. It is no more than half a mile from Kellogg to my brother's house. It is about a mile from the depot to my brother's house by the usual traveled route. When I saw Butler returning it was on the road in front of Hyde's store. I was up in the door over the store looking down on the sidewalk.

Redirect Examination.

You can see the track from Hyde's store. The overcoat he had the gun wrapped up in he had on, and he had an old hat stuck in his pocket after the explosion.

Recross-Examination.

He had the gun wrapped in the overcoat when he went down and when he returned had the overcoat on. Did not have a gun when he returned. It was three or four hours between the time I saw him first and the second time.

Testimony of Emma Skinner.

Reside at Kellogg. Have lived there 14 years. Live between Kellogg and the station, about the center. Live on what is called the Wallace road. Saw a great many men pass our house on the morning of the 29th of April last. Some had guns and packages. It was all the way from half-past nine and between 11 and 12, sometime. They were going down the Wallace road. Saw about 50, maybe more. Am acquainted with Dennis O'Rourke. Saw him go by my house that day somewhere between half-past ten and half-past eleven, going toward Wallace. There was a man with him, but I do not know who he was. That is the man (indicating). Am not acquainted with Francis Butler. Have seen him several times. Saw him that day pass the house and saw him come up after the mill blew up. First saw him between 11 and 12. He carried a bundle in which there was a gun. There was a coat of some kind thrown over it. It looked like an old mackintosh. He was going toward Wallace. He was not with anybody that I remember of. There were several behind him, all straggling along there. The next time I saw him he was coming by Hyde's store, going toward Wardner. He had on the old overcoat which he had thrown over the gun going down; had on a light

hat and had an old hat stuck in his overcoat pocket. Didn't notice any ribbons or anything tied around his arm. Have seen the defendant Louis Salla before. Am not acquainted with him. He used to pass the house a good many times last spring. Saw him on the 29th of April pass the house; he had a bundle. Was going toward Wallace. Did not see him again that day. Saw him going down the road before that train came in.

Cross-Examination.

When I speak of going down the road that means in the direction of Wallace. When I observed Mr. O'Rourke he was about as far from me as from here to the other end of the room. I could not tell how he was dressed. It was between ten and eleven; sometime before the train come in from Wallace. He was in my view just a few seconds. Had a full view of his face. Saw Butler not long after. Don't know how long. Also saw him come back after the mill blew up. At that time I was above Hyde's store, looking out of the door, and Butler was below me on the sidewalk. He had on a long overcoat, or mackintosh, a light hat and an old hat stuck in one of his pockets. Took no pains to observe him. Was just looking out and happened to see him. My sister-in-law and one or two other persons were present. This building I was in was between Wardner and the depot. It was not long after the explosion. Don't know where Mr. Salla lived during the month of April. I was in the house at home when I saw him. Was sitting in the window all forenoon. He was in view about the same length of time as the others. My husband works on the tram-

way for the Bunker Hill Company. Has been engaged there nearly four years, and has had no other business since he has been in Wardner. The support of himself and family depends upon his employment.

Redirect Examination.

A large proportion of the population of Wardner is dependent on the Bunker Hill and Sullivan.

Testimony of Mary Doty.

Reside at Kellogg, Idaho. Have lived there since the first of April. Am married. Was there on the 29th of last April. Saw men going here and there, and passing our house. Know Francis Butler. Saw him on that day. Saw him down to Mr. O'Rourke's house, around the side of the house. He went into the woodshed several times and back out again. He came out with some kind of a bundle wrapped in a dark coat, and he went back in again. Could not see what he brought out. He went down across the bridge by Mr. O'Rourke's house and took some guns up from the sidewalk, and put them under the coat and went down to the railroad track with the rest of the crowd that was going by. I saw him again that day on McKinness' porch, down at the junction. He was dressed just the same as when I saw him before, but he had no bundle. I says to my husband, "There is the man that carried the guns, because I know him by his clothing." It must have been somewhere along about 12 o'clock. It was after the train came in. Am not sure how many guns he took from under the sidewalk, but am certain he took one. I was about a block from him.

Standing in my yard. It was a long gun. Could not tell whether it was a rifle or a shotgun.

Cross-Examination.

I should judge it was about a quarter to 11 when I first saw Mr. Butler at O'Rourke's house. I was in the yard at my house. There is nothing to obstruct the view. There might be a few little stumps, but not but what I could see over. Could not say as to how many feet or yards. The houses are in the same position now as them. They are on the same side of the street. They are right on the corner and I am just back of them. Did not see Dennis O'Rourke that day. When I saw Mr. Butler at O'Rourke's house at about a quarter to eleven he had light pants, a dark coat, and a light hat and tan shoes. Had no overcoat on. Was not masked. He did not have a gun when I first saw him. He had the bundle under his arm done up in an old dark overcoat. Looked like a rubber overcoat. Did not see anyone else at O'Rourke's house. Butler was in the wood-shed outside the fence. The wood-shed is between their house and my house, right close to my house; stands between O'Rourke's house and our house. I believe there was some wood piled there against their wood-shed. Could not say how high it is. Was out in my yard at the time, because I saw so many people going past our house with masks and guns, and all in such a hurry. O'Rourke's house was right along my line of sight. The second time I saw Mr. Butler was down at the junction. He was standing by the crowd. Was dressed just the same as when I saw him before. It was before the explosion, between 11 and 12

o'clock, just a few minutes after the train pulled in. We were in a team driving through the crowd, and I just took a glance over the crowd and said to my husband, "There is the man that carried the gun." We were going out of town to a friend of ours. Started before the explosion and went to the junction just a few minutes after the train pulled in. At the time of the explosion was over to Mr. Jacobs, about a mile and a half from our house. My husband is yard boss for the Bunker Hill Company. Has held that position a little over a year. Has no other business and no income except his earnings from the Bunker Hill. I gave testimony in Spokane regarding Mr. Butler. Do not think I testified in Spokane that I was upstairs and made my observation from that point. At the time I saw Mr. Butler taking the guns from under the sidewalk I was in the front yard by the front door, in the same place. The sidewalk is just a little ways from Mr. O'Rourke's house, just opposite our house. He did not take up any boards. Just reached under and took them out. Could not say how many guns. There were people all along the street going up and down. I did not know any of them.

Testimony of William Doherty.

Reside at Keller, Washington; occupation, stage-driver. Have been there about three months. Before that lived at Wardner for about a year. Occupation there was teamster. Was in Wardner at the time the armed and masked men came down on the train from Wallace. Was driving a team that day. Was at the mine at the time they come down, the Bunker Hill Mine.

Am acquainted with Dennis O'Rourke. Have known him about a year. Saw him on that day. I was loading coal and he walked by the car. I spoke to him and he answered me. He was dressed about the same as usual, only had a mask on. I said, "Hello, Denny," and he said, "Hello," and walked right by. I did not see his face. Recognized him by his walk and the hat he wore. Had seen him wearing those clothes before. That was about one o'clock, I should judge. He was going down toward the Bunker Hill mill from the depot.

Cross-Examination.

Prior to that I had seen him wearing a dark suit of clothes and dark hat. Cannot give any nearer description than that. Had seen other men in that section of country wear dark clothes, the same sort of clothes. He was not wearing any clothing that was unusual. He might have been in my view a minute; he passed the door. I was in the car loading the coal. He was alone and masked but had no arms. Did not see his face. Had seen him wear that suit before. Would not swear it was the same suit. Will swear as to the hat. I could not identify him by the suit of clothes, but could by the hat. If I am not mistaken it was a black hat with a wide rim, and it was bound, I think. He wore it every day, as a general thing. Could not swear there was no other hat like it in the town. All I knew about O'Rourke was his hat and his walk. There was nothing about the hat that I could swear positively it was Dennis O'Rourke. It was just an impression that flashed over my mind. He has a very long walk, long steps and walks very quick. Am

positive it was him from the walk. Might have been other men walked that way, but I never noticed them. Have noticed his walk several times, but not so closely that I would be willing to swear at the risk of a man's liberty that it was Dennis O'Rourke. Do not think I am mistaken, although I might be. I realize the fact that I may be mistaken. Was driving team for Swinerton, transferring material to the Bunker Hill mine. I expect my employer had a contract with the Bunker Hill mine. Was summoned in Keller, Washington, to come here. Did not know that I was not obliged to come here. Did not come voluntarily. Was served by the United States marshal of Washington. Consulted my employer. He gave me permission. Was given $2.40 and a ticket from Spokane. First disclosed the fact that I thought I identified O'Rourke in Wardner. Don't know who I told it to. I was a witness at the coroner's jury. Do not remember the month it was; the inquest on the bodies of Cheyne and Smith. As near as I can remember testified to the same facts as here.

Redirect Examination.

I recognized O'Rourke's voice. There is no doubt in my mind about it being O'Rourke.

Recross-Examination.

Do not remember the color of the mask. Could not tell whether it was black or white. Could not tell how far it extended from the top of the head. Remember it was very narrow and showed up the side of his face and the ears along here. Did not tell him by the ears. There

was holes for his eyes. Could not say whether there was any for his mouth. The mask did not muffle his voice. It sounded just the same as his natural voice.

Testimony of Albert Swinnerton,

Reside at Wardner; am 17 years old. Have lived there about 12 years. Live with my parents. Was in Wardner the 29th of last April. Saw the train come in; had been home to dinner and got down there just as it stopped; the men were jumping off. Have known Dennis O'Rourke about eight years. Saw him that day right where the soldiers are stationed now, on the road there. He was coming up the road from the mill. It was about 15 minutes before the explosion. He was masked with a narrow white mask that exposed the side of his face. Saw his face and also recognized him by his walk. Was about ten feet from him.

Cross-Examination.

Am not engaged in any business or employment. Was driving a team that day for my father, hauling timber to the Bunker Hill flume. I know Mr. Doherty, who was just on the stand. He was a teamster for us. Was not on the team when I saw Mr. O'Rourke. I went down the mill road and was stopped by the men that were crowding down there, and took the team up and let one of our men have it. We had some other teams down there and I went back and they stopped me, and when they said it was all off with the mill, and I stopped there by the wood-pile. That is how I came to be there. Mr. O'Rourke passed. We were both on the same side of the

wood-pile. There was other people around there. No one that I know. There were holes cut in the mask for eyes, that was all. He didn't stop to have any conversation with me. I could not see all of his face. As he passed I took a glance at him and see the side of his face. By looking straight at his face, with that mask on, I could not identify him, but by his walk. Saw about half of his ear. The other ear I could not see. Could see more of his face when he got by me. Could see him back of his mask. I recognized him by the view I got of his ear and his walk. Had noticed his walk before that in particular. Noticed that he walked different from any other person. He has a kind of swinging motion, and long strides. There were others who had a similar walk. The place where I saw O'Rourke was about 300 yards south of the depot. He was walking—just walking along at a pretty good gait. I did not notice him after he passed me. I did not observe anything about the back of his head or anything that would enable me to identify him or strengthen my belief as to his identity. It was something after one o'clock, I think—between one and two—that I saw him.

Testimony of Ed. Booth.

(Recalled by Plaintiff.)

You asked me if I had seen Mr. Maroni more than once on the 29th of April, and I stated I had not. I saw him walking up the track and stop, and when I looked back I saw him again. The operator tapped on the window, called my attention, and I looked that way, and when I looked back again I saw Mr. Maroni. At the first time I

saw him I saw no gun. When I looked back he was standing on the track; he had stood the gun on the ground and was waiting for a man to catch him. When I saw him first he was right along where the switch stands. When I saw him the next time he was about where the frog is, where the switch has left the main track.

Cross-Examination.

I first saw him where there is a culvert, where the Stemwinder switch stands; that is about 200 yards from the depot, in the direction of Wallace, east. He was not masked or disguised in any way. Did not notice any weapon the first time I saw him. The operator called my attention to the window and I turned to the window, and spoke to me through the window, and when I looked back Mr. Maroni had stopped and was standing still in the track, and the gun appeared to be setting on the ground, and he had it by the muzzle. He was somewhere in the neighborhood of a hundred feet further up the track, somewhere near 300 feet from the depot. He was waiting for some man to catch up to him, and when the man caught up with him they went up the track. That man was between Maroni and I. He was not masked or disguised in any way. That was a little before the train come in, between 11 and 12 o'clock. I was between the telegraph window and the east end of the depot; at the end nearest to where Mr. Maroni was. Would not say they traveled 50 feet in my view. I turned and went into the depot.

Redirect Examination.

The man I saw going up the track to meet him was John Domonick.

Testimony of Mrs. Burke.

Reside in Shawnee, Whitman county, Washington. On the 29th of last April resided in Kellogg, Shoshone county, Idaho. Am married. My husband is a railroad man; a section foreman generally. On the 29th of April he was working in the yard at Kellogg. I kept a boarding-house there, and did on the 29th of April. Noticed an unusual number of men that day at my place at dinner. The boarding-house was the section-house, which was about 500 feet below the station toward the Bunker Hill mill. Recognize the defendant, Mr. Wallace. Saw him that day in the section-house. He came there about ten minutes after the train came in from Wardner. He asked me for his dinner, and I did not have it ready. He said he would wait. It took me about an hour to get his dinner ready. He stayed there an hour and a half or two hours in all. He never moved. He came in there about ten minutes after the train came, and he did not go out until some one came in the house and said for me to get out with my family, the mill was going to blow up. That was about 15 minutes before the mill blew up, and he went out one door and I the other. I saw him at the bull-pen once after that. I told you yesterday that I did not know the man until he sent for me at the bull-pen. I wanted you to let me go home, and I told you that. I was not under oath. I told you I did not remember seeing him at

my place, but he sent for me at the bull-pen afterward. You wanted me to tell you that. I told you I didn't know anything about the man. Have had no conversation with the attorneys for the defendants. Do not know one of them. Never saw them before.

Cross-Examination.

The attorneys for the prosecution did not tell me what they expected me to testify to. Did not say anything about my testimony at all, except what I have mentioned here. Mr. Wallace was dressed on the occasion just about like he is now. There was nothing peculiar about his dress.

Testimony of J. M. Martin.

Reside in Shoshone county, Idaho. Give my attention to mining. Now reside three miles east of Wallace on the Mullan road. Have made that my home since the 29th of October, 1891. The defendant, Arthur Wallace, came to the Sunset camp and I was introduced to him by a man by the name of McDonald, on the 4th day of last May, on Thursday. He stayed over night there and went away the next day. He came back the following day, on Saturday, and stayed Saturday night, and left again Sunday, following this Thursday. He seemed to be seeking employment. He wanted I should put him to work. He said he was out of employment and wished to work there. He came there on the 4th, about five o'clock in the afternoon, with this other gentleman. I was coming down from the place in the tunnel to get some fuse. McDonald introduced him to

me. I excused myself, after receiving the introduction, inviting them to make themselves comfortable until I helped the men to load the holes. I came back and told them if they were tired they could remain over night. He accepted the invitation and the other gentleman said he had to go home across the peak. After —— came in from work there was some inquiry as to the news and movements down at Wallace. He commenced talking about the general movements, everything that had taken place on the 29th of April. He said at that time he was working at Mullan, and that the Mullan men marched on foot to Wallace and met a train from Canyon creek, from Burke and Gem. He said they got on the train there and went on their way down to Wardner. That in going down they stopped before they came to a short curve and sent out a flagman to flag any other train, and when they got near Wardner a lot of men from Wardner met them, went on to the train and went to Wardner. He said when they got down to Wardner they detailed about seventy-five men—three them out to the left-hand side along on a ridge, a high piece of ground; that there was a lot of men went to the mill and placed the dynamite in place. That when everything was ready for the destruction of the mill some of the men at the mill got excited and commenced shooting their guns off; that he supposed there was about a thousand shots fired. He said the men they had put on the ridge thought it was scabs firing at us fellows at the mill, and said they commenced shooting down that way and our men commenced firing at those fellows up there, thinking they were scabs. He said one of the men that was detailed up on the ridge by the name of Smith was

killed. He said, "I am satisfied our own men killed him in that fire." That after everything was ready for the explosion "I ran up to the train, got up on to the platform of the car nearest to the mill so as to have a good view of the destruction of the mill when the explosion took place." He said there was a large, fleshy gentleman standing on the end of the platform who asked him what his name was, and that if he had been up fifty or a hundred feet further he would never have drawn another breath; that he learned afterward he was a justice of the peace down there; that after this he went to the section-house, met some of the rest of the men, and got some dinner; that the lady of the section-house complimented them very highly for what they had done; that they were cheered several times on their return trip home by people living along on the track and near the track. That it was a perfect link; that there was a delegate from each and every union notified other unions to be on hand as near half-past ten o'clock as they could get there, at Wallace.

Cross-Examination.

The place where I met Mr. Wallace is about ten miles from Wallace. He reached there Thursday, the 4th day of May, about 5 o'clock in the afternoon. Think the conversation really commenced while we were eating supper, about six o'clock. There were present a young man by the name of R. A. Martin, supposed to be my son, and a man named James Jessen, who was working in this tunnel. I understand my son is now in Chicago, Illinois. Mr. Jessen quit work on the evening of the 1st of June and went to the south part of the State. His address is

St. Anthony, Idaho. I was before the coroner's inquest held on the bodies of Cheyne and Smith, some time in May or June. My son was not there, that I know of. This other gentleman told me he was subpoenaed to appear there, and that he went down. I remember very distinctly what I have repeated of that conversation with Mr. Wallace. I might have left out some remarks that he made. I do not say there was not any other words used. I can swear positively that every word of the language I have used here was used by Mr. Wallace on that occasion. I could not be mistaken about any of the words. He did not say, the men "we" placed on the hill, or the men "they"placed on the hill. He said "the men we detailed to go up on the hill." I am positive the word "we" was used. Referring to the statement that "our" men killed him, or shot him, I am positive that the word "our" men was used. With reference to the man who asked him his name, standing on the platform of the car, Mr. Wallace said he was a large, fleshy man, and if he had been fifty or a hundred feet farther up he would not have drawn a second breath; that he learned afterward he was a damned old "scab." I was directing work for the Sunset Mining Company. Had no dispute with the miners about the rate of wages. The sheriff of Shoshone county entered a complaint to me that I was trying to destroy the peace of Shoshone county by reducing wages to two dollars per day. I did not reduce wages. Had positive instructions from the company when I went there to be very careful and pay the going wages, and everything. There was a report circulated about Butte that the Sunset was reducing wages, or making an effort to, and J. K.

Clark wrote me and said he told the reporter that it was a damned lie, and told me to pursue the course I had always pursued; be careful and cautious and pay the going rate of wages. Mr. Wallace did not tell me in that conversation that he had read an account of the affair in the "Spokeman Review," or "Spokane Review." Sam McDonald, the man to come to the camp with Mr. Wallace, did not stay there all night and was not present at that conversation. Mr. Wallace left some time during the day on Friday, and came back on Saturday, and remained until Sunday morning about 9 o'clock, when he went away for good.

Testimony of Thomas Wright.

Reside at Wardner, Idaho; occupation is hardware clerk. Have been engaged in that a little over two years at the same place. Saw the defendant, C. R. Burris, there on the 29th of last April. He came into the place and wanted to buy a box of rifle cartridges. He did not say what he was going to do with them. I did not sell them to him because I saw an unusual stir on the street, men going down the gulch with bundles on their arms, and I thought it best not to sell any more cartridges, although I had sold some that morning.

Cross-Examination.

Am connected with the firm of J. F. Van Allen, hardware merchant. It was somewheres between half-past eight and nine o'clock on the morning of the 29th of last April that he applied for the cartridges. I had known Mr. Burris before that time. He had been living there

some time, I think. I have been acquainted with him 3 or 4 years. I do not know what his employment had been that morning before he applied to me for cartridges. I think he had been clerking in a saloon a few days before that. He wanted 45-60 or 45-65, as near as I can recollect; that was the number of the cartridges. Those were intended for a Winchester rifle. It was not the morning of the 28th those cartridges were applied for. He was in the store just a few minutes. Appeared to be in a hurry; just long enough to make the application and have it denied.

Testimony of P. J. Keagan.

(Called by Defendants.)

Reside at Wallace; occupation, millman. Was a resident of Wallace on the 29th of last April, and was there that day at the Pacific Hotel. Am acquainted with the defendant, Mr. Garrett. I saw him in Wallace on the 29th of April, near the O. R. & N. depot. I was not working that day, having wrenched my back about four days previous to that in the mill, and was laying off. After breakfast that morning went back to my room and was there about two hours, when this Northern Pacific train came in, and I could look out of my window and see the train. Saw quite a large amount of men on the cars. It looked unusual, and I got up. Came downstairs, and the train was standing in front of the O. R. & N. depot. Went across the bridge there, over the river, and across the O. R. & N. track. When I got over there met Mr. Garrett, and spoke to him. Said, "Hello, Charley," and he said "Hello, Pat." About that time there was some gentle-

man came from the engine with a gun, and says, "Come here; I want you"; and Garrett says, "No, I ain't got no time; I want to go up to the depot," and Garrett was in the act of going away when another man came from the engine with a gun. He says, "What is that, he won't stop?" and he got around in front of Garrett and said, "Get around on that engine, I want you; you are an old railroad man; we have got some flagging to do." They took Garrett and he went over to the pilot on the engine, on the back end of the tank. The engine was in the act of backing up, and that is the last I saw of Garrett. Saw he went over on the engine, and those two men compelling him with guns. They said he would come in pretty handy to flag for them.

Cross-Examination.

Have resided in Wallace permanently about three years and a half. Am working for the Standard Mill Company. Have worked for that company pretty near three years; not always as a millman. First worked wheeling ore. Never worked in the mine, and was never a member of the miners' union, and am not now. Am not a member of the Knights of Labor, and have not been for eight or nine months. The men that came over and talked to Garrett were masked. Could not say as to their dress. There was considerable excitement there that attracted my attention. I was at the lower end of the platform when I saw them. The platform extended, I should judge, perhaps 75 or 80 feet below the station. The train had not been in perhaps more than two or three minutes. Garrett came as if he was coming from down town. He was

not right at the depot when those men met him. He was going toward the depot. He could see the train. There was quite a number armed and masked men on the train. I went over just for curiosity sake. I did not go to Wardner that day. The first man that came over with a gun did not point it at Garrett. Judge it was a rifle. Would not be positive as to that. He had a mask on. When he made that statement he was just below the depot. The other man was also masked. All three got on the pilot. That was three or four minutes before the train pulled out. It went to the Northern Pacific station and stopped there about a half an hour. I went down there. Did not see Garrett again. The water tank is about half a mile below there. Could not say whether they stopped there. Did not see it. Have known Garrett about two years, on and off. Am personally acquainted with him about a year. He is a blacksmith. Last winter he was working for the Standard Company at Mace. Am not in any way particularly a sympathizer with the miners' union. Worked with some of them.

Testimony of John S. Earles.

(Called by Defendants.)

Reside at Mace; occupation, miner. On the 29th of April last I was at Mace and Burke. At Mace, in the morning I was where my residence was; was asleep. Went up to Burke to get shaved. Am acquainted with the defendant Mike Malvey. I saw him on that occasion in Burke in the barber-shop when I went up. I was born in Utah. Was arrested in Butte on the 13th of May.

Since then have been in jail in Butte, in Helena, and in Moscow. Was released last Monday.

Cross-Examination.

I went up to Burke on the 29th of April, after dinner, and saw Mike Malvey there. Have known him probably eight or nine months. First met him in Burke. He is a miner, working for the Frisco, as near as I can find out. Saw him that day in Farrell's barber-shop; he was getting shaved. There are no barber-shops in Mace. Go to Burke about twice a week. Mr. Irvine Edwards was present when I saw Malvey in Burke. I was not down to Wallace that day at all, nor to Wardner. There were several in the shop when I saw Malvey. Know them by sight but could not call their names. The barber's name is Ritz. There were probably four or five in the shop at the time. Am a member of the miners' union. Was arrested in Butte for being one of the dynamiters. I resisted coming back here. Fought as hard as I could about being brought back to this State. Was brought back here the twenty-second or third of June. Have been in jail since. Could not tell what the charge against me was. The charge aginst me in Butte was delaying the United States mails; a similar charge to one these men were arrested on. All these defendants have been with me until lately. Edwards was with us most of the time. He was arrested in Butte and brought here the same time I was. He is a member of the miners' union. Mike Malvey is a member of the union. Malvey was not working that day. He did not say why he was not working. Saw

him between two and three o'clock. Left Idaho to go to Butte on the 2d of May. Understood there was going to be martial law. On account of the bull-pen is why I left. There was no bull-pen established at that time, but I understood from the fact that there was one before that there would be. I know they would make a dragnet as they did before, and understood everybody would be arrested. Worked on the 30th day of April at the Standard Mine. Worked on the night shift. Worked a day and a half, until the 1st day of May. Then went to Wallace and from there to Missoula. Was not discharged from the mine and they owed me money when I left. I got it at Moscow. Was going to Montana to get away from the soldiers, because I was afraid of getting into the bull-pen.

Testimony of Irvine Edwards.

(Called by Defendants.)

Reside at Mace, Idaho; occupation, miner. Have resided there a little over a year now. On the 29th of last April was at Mace. Did not work on the 29th because they laid off to connect the steam pipes on the hoist. I was also at Burke that day. Am acquainted with Mike Malvey. Saw him that day in a barber-shop in the afternoon, between the hours of two and three. John S. Earles was with me at that time. He accompanied me there. Have been arrested since that time. Suppose the charge has been dismissed. I was released last Monday. Think I was arrested on the 13th of May and have been imprisoned continually ever since. Was in the Butte jail, Helena jail, and Moscow jail. Was arrested in Butte.

Cross-Examination.

Was working for the Standard Mine shoveling, on the night shift. Worked the night of the 28th of April. Was accustomed to get up at noon for dinner when I was working on the night shift. Quit work at 5 o'clock in the morning. Generally got to bed about six and sleep about 5 hours. They call about a quarter to twelve. That was my ordinary custom. Go to bed in the afternoon sometimes. Did not that afternoon. Went to Burke about one o'clock. Was in the barber-shop between the hours of two and four, and saw Mike Malvey there. He was getting shaved. I got shaved. Mr. Earles was in the barber-shop. Think Eddie Pritchard was in there. He lives at Mace, but did not go up with us. There was more in there; two or three. After leaving Burke went back to Mace. Ate supper there and went to bed about ten o'clock. Did not work that night but did the next night, on the 30th. Worked all night until 5 o'clock in the morning. Went back to work after that and worked half a shift. I quit because I read in the paper that martial law was declared and the soldiers were coming in. That was in the "Spokesman Review." Never was arrested before. The paper said everybody in the canyon would be arrested that was supposed to be guilty. I went to Wallace the second day of May, and from there to Missoula. Went with John S. Earles. From Missoula went to Anaconda and from there to Butte. Was not discharged from the mine, and it owed me $66.50 when I quit. Left a slip there to forward my time. It was forwarded to Anaconda. Rode out of Wallace on a passenger train and

paid my fare to Missoula. Was arrested in Montana on a charge of interfering with the mail in this State. Sued out a writ of habeas corpus to get out of the possession of the officers over there. Have been in jail here since the 22d or 23d of June. Malvey worked in Burke. Think he worked at the Tiger Mine. It was not running that day. He was a machine man.

Testimony of A. H. Lee.

(Called by Defendants.)

Reside at Burke, Idaho; occupation, butcher. Have resided there a little over two years. Was born in Canada. On the 29th of last April was at Burke, pursuing my usual vocation. Am acquainted with the defendant Mr. Malvey. I saw him on that day. I locked the shop up at three o'clock to go to dinner, and went across the street to get a drink and Mr. Malvey was in there, at Mike Maher's saloon. I was arrested the 4th of May and released the 7th of May. Was again arrested the tenth of June and was in the bull-pen a month and ten days that time. Am not quite twenty years old. There was no charge made against me that I know of.

Cross-Examination.

Butchering is not my business now. Have not done anything since the 15th of May. My parents do not live in Burke. Deputy Rose and Sutherland arrested me. I do not know what they arrested me for. They did not arrest me claiming I was down to Wardner that day with those men. Am a member of the Western Labor Union,

but not a member of the miners' union or the Knights of Labor. Have been a member of that union about six months. Don't think Mike Malvey is a member of that union. He is not if he is a miner. The Western Labor Union is composed of men that work above ground. I was working for the firm of Brass & Rothrock, butchers. Saw the defendant Malvey in Mike Maher's saloon about three o'clock. He was drinking. There was a crowd in there, 10 or 15—Crotty, and Ben Snyder, Sam Lake, Cleary, and a few of the other boys. They are not all there now. Was in the bull-pen a month and fourteen days altogether. Was released the 20th of July. Do not remember having any conversation with Malvey at that time. Think I went in with A. C. Cleary. Think he was in the shop when I locked up. Have been a sympathizer with the miners' union since being put in the bull-pen.

Redirect Examination.

The reason I am not working at the present time is that my boss got out of the bull-pen about the ninth or tenth of May and shut up shop on the 15th. Most of the men were in the bull-pen, so he started a peddling wagon up there. Have tried for a job but could not get it.

Testimony of Ed. Flannigan.

(Called by Defendants.)

Reside at Mullan; am in the real estate business and justice of the peace. Am acquainted with the defendant Mr. O'Donnell. Was acquainted with him in the early part of the present year and during the months of April

and May. The night of the 11th of April, I was down to Wallace and met Mr. O'Donnell. He appeared to be very sick. On the morning of the 12th I took the train for Mullan, and Mr. O'Donnell was on the train, on his way to Montana. I sat down in the seat with him, and on account of old acquaintanceship with him I naturally asked him how he was getting along, and he told me he had been enjoying very poor health, and he had tried to work and found he could not stand it, and was going to Montana for his health. I next saw him along about ten or eleven o'clock on the night of the second of May at the Mullan depot of the Northern Pacific Railroad, on his way back from Montana into the Coeur d'Alenes. I stepped up into the car and went in and talked with him until the train was about ready to start. I received one communication direct from Mr. O'Donnell during the period of his absence, and a communication from another party with his name mentioned in it. I was born in the city of Providence, Rhode Island. Was arrested after these troubles, on the 13th day of July, and charged with opposition to the State administration. I was never prosecuted, but was released on the 10th day of October. Was kept in the bull-pen 89 days.

Cross-Examination.

Saw Mr. O'Donnell at the town of Mullan on the 2d day of May, at the Northern Pacific depot on the regular train from Missoula to Wallace. He was going toward Wallace. He could hardly have jumped on at Mullan without me seeing him. Saw him from the 13th day of July until the 10th day of October in the bull-pen. Am a justice of

the peace at the present time. As to why I was thrown in the bull-pen I only know what the mouthpiece of the administration told me. I have been a miner, but never belonged to the Western Federation of Miners or the miners' union. Twenty-one years ago I belonged to the miners' union in Bodie, California. Never belonged to any miners' organization up here. Formerly belonged to the Knights of Labor. The letter I received from Mr. O'Donnell was from some springs in Montana, of which I forget the name, and reached me about the 24th or 25th of April. I am a sympathizer with all labor organizations, and have expressed myself strongly in favor of them, and in favor of the miners' union as it exists up there now. I have denounced any attempt to ferret out any of the trouble up there, but, on the contrary, have assisted all that I could. Several deputies asked me to assist. I was in Mullan on the 29th of April until about half-past two in the afternoon, at which time I went to Wallace on business.

Redirect Examination.

I have expressed myself on different occasions in regard to the treatment accorded those men in the bull-pen, and very emphatically.

Testimony of Joe Garrad.

(Called by Defendants.)

I live at Kellogg. Am a miner. On the 29th of last April I was at Kellogg and remained there pretty near the entire day. Am acquainted with Louis Salla. Saw him on

that day in a saloon, playing pool. I was playing with him. We started about ten o'clock and quit when the train came in from Burke. Then we drank a glass of beer, throwed up the game and went out to the station. Remained at the station five or ten minutes and then went into the saloon again and played pool. We played a game and then the saloon was closed up. We then went outside, and I went to the station and afterward heard the shots go off down to the mill. Have known Louis Salla for four years. Have been in the habit of playing pool with him frequently. Was born in Italy; am a citizen of the United States, and have been ten years in this country. Was arrested and kept in the bull-pen five months and a half. Was not charged with the commission of any crime, that I know of. Was never notified of any charge against me. Asked to be allowed to see it, and was refused. Was released the 18th day of October. Was arrested the 3d day of May. On the 29th of April, after the saloon was closed up, I saw Mr. Salla again. He had no gun and was not masked or disfigured in any way that day. Was dressed as he is now, except that he had a shirt instead of a sweater. The saloon was closed between 12 and half-past 12, I think. Salla was with me at the time the mill blew up. We were at the O. R. & N. depot.

Cross-Examination.

I worked for Mike Sinclair. Have not worked since. Nobody come up there and asked me to quit work. I quit because they wanted to put me on a ten-hour night shift. Henry Maroni quit working on the same day. On the

29th of April, Louis Salla and I were in the saloon of Pete Albinola. A few other men were in there. One was Harvey Pasaldia; they call him Jack. The saloon is in one room and the billiard-room in another. The boss closed the saloon. Saw the train come in. Saw lots of men masked in a couple of cars and saw them get off the train. Am a member of the miners' union. When the mill exploded I was within about 10 or 15 feet of the platform at the depot. Louis Salla and Jack Pasaldia were with me. When the mill exploded I did not say, "Down with America," or hear anyone else say so. Was naturalized in Massachusetts and have been in the Coeur d'Alene country five years, working continuously as a miner.

Redirect Examination.

By the rules and customs of working in Shoshone county nine hours is a night shift and ten hours is a day shift.

Testimony of Pauline Carroll.

(Called by Defendants.)

Reside at Kellogg, Idaho; have lived there six years. Was there on the 29th of April last. My father is a miner and my mother keeps boarders and hens and chickens. Am acquainted with Mr. Maroni. Have known him for three years and a half. Saw him on that day. He was home all day, sick in bed. He got up and had his lunch and sat up awhile and then went back to bed. He had a doctor call to see him between three and four o'clock on the 28th of April. Mr. Maroni did not leave my mother's house on the day of the 29th of April. He had

no mask or gun, and was not out of the house. He had been sick six or seven days, and was sick four or five days after the 29th of April. He was arrested at our house, and was in bed when the officers came. I saw them coming, and he was frightened and got up.

Cross-Examination.

I go to school but was not in school that day. That was Saturday. My father lives with us. He is working away from here. He was working in Mr. Day's tunnel. My father is not a member of the miners' union. Don't know whether Maroni is a member of the miners' union. He got up about 12 o'clock and got his dinner. I was in the house all day. We live above the Oregon Railway & Navigation Company's depot toward Wallace, on the right-hand side, a few feet from the road. Did not see the train from Wallace come in that morning. Was out in the yard that day playing with the children. Saw some men going by that day, but not with arms or masks. Didn't hear any general shooting, but heard the mill blown up. The depot is about 300 feet from our house. Maroni was up when he ate his dinner about 15 minutes.

Redirect Examination.

Mr. Maroni just ate a little bit of soup that day.

Testimony of F. P. Marchette.

(Called by Defendants.)

Reside at Wardner. Have lived there about eight years. Was there on the 28th and 29th of last April,

practicing my profession. Am acquainted with the defendant, Henry Maroni. Visited Mr. Maroni between three and four o'clock on the evening of the 28th. I found he had a temperature of 104; pulse was 120. He was threatened with typhoid fever. Prescribed for him. I should not think it was possible for him to have been out the next day. The next time I saw him was in the prison at Wardner; they call it the bull-pen. That was a day or so after the arrest. Must have been the 5th or 6th. He still had some fever. Did not take his temperature, but gave him some medicine at that time. Have known Mr. Maroni probably 3 years.

Cross-Examination.

On the 29th of April I was in Wardner. Went to the junction about 12 o'clock, or a little later. Mr. Bell, the deputy sheriff, deputized me to go down with him at that time. When I got down there I hitched my horse in front of Mr. Albinola's saloon and we started to go down the track. Some man with a mask on came to me and said there was a man shot down below. He wanted me to go down as soon as I could get there. We started down the track and got to the culvert this side of the Bunker Hill mill, and some one came up to me with a mask on and said there is no use to go down there, the man is dead. So I turned around and went back to the junction, and took my horse and hitched him around on the other side of the store building there. When the shooting started we started to cross toward where the shooting was going on, on the side hill, and a couple of masked men stopped us and told us to go back. There

was quite a crowd of them. Did not recognize anybody that day. No one spoke to me except those who had masks on. I recognized a man named Beasley. I believe. Don't know where he is now. We could not do anything in the way of identifying anybody. I looked closely at those I saw but there was nobody I knew. I practice medicine in Wardner among all classes of people. Have had a hospital there, and had one on the 29th of April. The Last Chance patronized it. All the men who work for the Last Chance Company are not members of the union. Got my pay through the Last Chance office. They kept out a dollar a month from each man, for my pay. They fired me two or three months ago. Am not now a deputy sheriff. Was just deputized for that day. Called but once on Mr. Maroni on April 28th. That was the first time I called on him in a professional capacity, and I did not see him again until I saw him in the bull-pen. I had left medicine with him. I naturally presumed he would get along all right, for I told him to let me know if he did not.

Redirect Examination.

Louis Salla called upon me and got some liniment for his arm, which was sprained or something of the kind, some time in April.

Testimony of Peter Orlandena.

(Called for Defendants.)

Live at Kellogg, Idaho; occupation, laborer. Have lived at Kellogg since 1890. Am a citizen of the United States. Was born in Italy. Was in Kellogg on the 29th

of last April. Am acquainted with Henry Maroni. Have known him about three years. Saw him that day, the first time in the morning. After breakfast went up to the house and he was lying on the bed. Knew he was sick the day before, and asked how he was. He said about the same. Then I went over on the other side, where I had a location, and looked at two different places; when I came back went to John Magobi's ranch and there met John Keneti. Stopped there talking maybe half an hour, perhaps not quite that long. Asked him if he wanted to come over with me, and so we came over to this side of the station, and I went home and got dinner. Then went to Carroll's house and saw Maroni still lying in bed. Said he was feeling about the same way. Saw him about 5 o'clock, after I had supper. Went in and stayed a couple of hours, until I went to bed. Spend nearly every evening there with those men. Maroni was still in bed. That was the 29th of last April. Am acquainted with John Lucinetti. Saw him on April 29th last. First saw him when I got down the gulch; met him in front of the house there and stopped about half an hour and talked with him. He came over with me when I went home to get my dinner. He said he was going to town; that he had some business to attend to, so I said I would go up myself, and we went up together. It must have been two o'clock when we started for town. First met him about one o'clock. Mr. Lucinetti did not have a gun or mask nor was he in any way disguised at any time I saw him that day. I walked from where Lucinetti boarded, at Mr. John Magobi's house, over to my place, and he waited while I got my dinner, and then

we went to Wardner. Left him in front of the postoffice and I went in the Montana saloon. I know the man who was tending bar for the barkeeper there. Have known him a long time, but do not remember his name. That is the man there (indicating defendant C. R. Burris). He gave me a couple of glasses of beer. It was about half-past two when I saw him there. Heard a shot go off just before I went in the saloon, and one or two went off afterward, because it jarred the glasses on the bar. The Montana saloon is about a mile and a quarter from the station at Kellogg. It is up-hill all the way from the station; pretty steep all the way up.

Cross-Examination.

Am mining, but am not a miner. Have worked underground. Am not a member of the miners' union. Belonged to the union a year ago last summer in Burke. Was not a member of that union on the 29th of April last. Live about 300 feet from the station. First saw Maroni about 7 o'clock in the morning. He lives about 150 feet from me. Went to see him. He had the doctor the day before and I went in to see him. Saw him again when I came back about half-past one. Saw a good many people when I crossed the station, but the most of the boys was way down the track. Went out to the claims about 7 o'clock that morning. Saw Lucinetti about one o'clock on John Magobi's ranch, where he lived. That is about three quarters of a mile from the station, I guess. Saw Maroni again that evening about 5 o'clock. Was not present at the station at all that day except in passing, and do not know what took place when those men

came in. Was not at the station and did not shout "Down with America" when the explosion occurred.

Redirect Examination.

I have no such feeling as stated by the attorney, and always support the United States. In going from Wardner to Mr. Magobi's ranch you have to cross the railroad track.

Recross-Examination.

Was arrested at home about 7 o'clock in the morning on the 3d of May, and put in the bull-pen and kept there until the 13th of October.

Re-redirect Examination.

Was not charged with any crime that I know of, and had committed none. Inquired what the charge against me was, and was told I was held by the United States.

Testimony of Josiah Jones.

(Called by Defendants.)

Have lived at Kellogg a little over two years. Work for wages. Was at home, near Kellogg, on the 29th of last April, most of the day. Was born in Ohio. Am acquainted with John Lucinetti, one of the defendants in this action. Saw him on that day at Mr. Magobi's ranch; he was stopping there. That was his place of residence at that time. I stopped in a house right near it. Am not sure what time I saw him in the morning, but remember of seeing him when the first train came down; that is, the train bringing the crowd. This ranch is a half a mile or little over from the depot. Saw Lucinetti

at that time; he had no mask or gun and was not disguised in any way. I saw him there until the train came in, as near as I can tell the time. Did not see him any more that day.

Cross-Examination.

Could just see the top of the train from my place. I first heard the cheering and hallooing as the train pulled in. Went up to a point above the house where I could get a better view of the road. I was probably a little over half a mile from the depot. The house where Lucinetti lived and mine were right near each other, over at the foothills across the river, half a mile from the depot. The trains were coming in when I saw him; he was over home. He went up on the point with me first, and the last I saw of him was about the time the passenger train went up there. He was then down to the house. Am not a miner. Used to work in mines but never in this country; not in the Coeur d'Alenes. Am not a member of the miners' union, Knights of Labor, or any miners' organization. Have not been arrested up there in the Coeur d'Alene country. Am not a strong sympathizer with the union men and have not expressed myself, except in certain cases. It is just as I think they deserve it.

Testimony of James Jesen.

(Called for Plaintiff.)

My postoffice is Saint Anthony at the present time. Am starting in to ranch. Have been a miner. On the 29th of last April was at Sunset Peak, Idaho. Have met

a man named Arthur Wallace, one of the defendants. Saw him a short time after the 29th of April; he came to Sunset Peak probably 2 or 3 days after the 29th; he was looking for a job; stopped there over night when he first came there, and then went over to McDonald's place, a few miles. He came back the next day and stopped probably two or three nights and then went off. When we came from our work in the tunnel he and Mr. McDonald and others was there. Some one asked him if there was anyone killed at the explosion, and Mr. Martin spoke up and said there was two men killed. I said I was sorry for that and went to washing. Mr. Wallace was talking quite freely but I did not hear all he said; just heard some words once in a while. He said he had been down to Wardner; heard him say he was at some woman's house at the time the mill blowed up, eating his dinner. Did not hear him say he had gone down on the train nor anything about his movements in Wardner. Believe I heard him say something about getting on the train and some one asked him his name or something, but I could not state positively about that. Was a member of the miners' union. Was working at Sunset Peak; Mr. Martin was the superintendent; the property belonged to W. A. Clark & Co. The wages were three dollars and half a day.

Testimony of Peter Orlandena.

(Recalled for Further Cross-Examination by Plaintiff.)

I started to the mining claim about seven o'clock in the morning and got down to the flat about one o'clock. My house is 300 or 400 feet above the station. My claim is

right in front of the Bunker Hill mill in that gulch which goes up, that we call Jackass Gulch. In going there from my house I go down to the station, then cross and take the wagon road and cross the river and go down by the narrow gauge; then take up the gulch; it is about a half a mile down. Was not at Wardner that morning at all. Crossed the Wallace road in the morning but was not up in Wardner going down that road toward Wallace at all that day. It was about one o'clock when I saw Lucinetti at his home; then went home and had my dinner and then pulled out for Wardner. He went into the postoffice; said he had some business to do in the postoffice at Wardner. After I got back from Wardner I went down to the depot. That was about four o'clock or a little after. The Wallace train had pulled out already. Was not around with that crowd at all that day; just went by. Saw Maroni about seven o'clock; then about half-past one. when I got home; then saw him again about 5 o'clock; then went home and got my supper and then spent a couple of hours there in the evening. Was not around that depot that afternoon and was not up on that flat that afternoon when those men were marching back and forth.

Testimony of Frank Whitmore.

(Called by Defendants.)

Live at Kellogg; am a prospector and leasor. Have resided there about 18 months. In the forenoon of April 29th last I was working in the Lombardy Mine. Am acquainted with Ed. Albinola. I was working with him that morning. We worked until very near noon and had

to leave because we had no coal. Gave an order for coal the day before, but it didn't come. We were blacksmiths there at that time, and used the coal for blacksmithing. We then went home; went down to my place. I noticed there was quite an excitement around town; a good many men going with guns on the narrow gauge track. I wanted to know what the excitement was about, and I told him I was going up town and find out, so I could take my family to a safe place, and he said he would go with me. We came up town. After we got up town I did not see him any more. Spent a few minutes to find out what it was, and took my wife and went to Boni's place and left her there. That is the last time I saw Mr. Albinola. We left there about half-past eleven; it is about a mile or a little over from the town, and I saw him again about 25 minutes after I brought my family back; I saw Albinola coming from the livery-stable, and I spoke with him again and asked him where he was going and he said up town. I was around the station that day. I know the defendant Mr. Butler by sight, and saw him on this side of the depot about one o'clock that day. He seemed to be taking notes; doing something like that. He had a paper and pencil in his hand. He was on the upper end of the depot toward Wallace. That was about one o'clock, as near as I could judge. The train from Wallace, I believe, had went further down the road, further west, toward Spokane. There were not many men around. The crowd that was supposed to have been passengers were not then in that immediate vicinity. I did not follow them, but I think they went down. The last time I saw Albinola, coming from the livery stable,

it must have been pretty close to one o'clock. It was a little before I saw Butler. The crowd had gone when I saw Albinola.

Cross-Examination.

Have been in that country about 18 months. Have worked underground in a mine, and have been a member of the miners' union, but not for two years. Never belonged to the union in that country. Belonged in Mullan two years ago. Am not a member now. Was arrested by a man named John Edmunson. I do not know what the charge was. Was held under a United States charge too, and gave bonds to appear before this court. Was in the bull-pen four months and a half about. Worked in the Lombardy Mine until about half-past 11; then left and went home; my home is between the mine and the station. Albinola went with me to my home. Reached home about ten minutes to twelve; did not stay there long—but a very few minutes, not over five; then went up town to investigate with Albinola; up to Kellogg; the train was coming in just at that time; came in as we were there; then went back and got my family and took them to Boni's for safety. Albinola did not go back to the house with me; saw him 20 minutes or half an hour later; he was then on the sidewalk coming from the livery-stable. He was alone; the crowd had dispersed; they were walking down toward the mill. He was coming toward the station, and the balance of the crowd were scattered for a half a mile. He was coming away from the crowd. Spoke to him; asked "Where are you going, what are you going to do?" and he said he was going back

to Wardner. Then I went back home. Found a man by the name of Bicklaw and he had no dinner, and I was very glad to get him down to my place to get information. Wanted to know what this affair was about. He came from Canyon creek, I think. He worked with me in Montana. He came down on that train. Took him to my place and he brought two or three of his friends with him; did not know them, was introduced but do not remember the names. Never saw them before or since. Do not know where Bicklaw is now. He had nothing to leave the country for. Could not say whether these men with him come from Mullan or Burke. Could not say they were Canyon creek men. There were three of them. They had no masks on and were not carrying any. Have not stated they left masks at my place. When I saw you at the depot in Kellogg you did not question me about Albinola. You were referring to these men that went to my house and I told you Bicklaw was the only one I recognized. I gave you the statement as I give it to you now. We only talked about three minutes altogether. I answered every one of your questions positively and directly. I did not think you had reference to Albinola at all. If you had asked me about him I could have told you. I took these men to my house and got dinner for them. Had taken my family away; they were at Boni's. Did the cooking for the men myself. We stayed at my house until the train came back from the Bunker Hill; it moved downward toward the mill beforehand and then moved back this way. I do not feel hard toward the prosecution or the State. Have sympathy for the truth and am working for justice. Have sympathy for these

men on trial, but never expressed myself on that subject.

Redirect Examination.

In the conversation I had with Mr. Cozier he did not mention the names of any of these defendants here; there was no name mentioned; he did not ask me if I had seen Louis Salla, Francis Butler, or any of these men; if he had I should have answered yes, and told him so.

Testimony of Herman Cook.

(Called by the Defendants.)

Reside within a mile and a quarter of Kellogg; occupation, rancher. Born in Wisconsin; have resided near Kellogg since 1884. Am acquainted with Ed. Albinola. Saw him on the 29th of last April; he was watering his horse in front of Frank Nolton's livery-stable. It was close on to one o'clock. The train had come from Burke long before that. The crowd had gone on down a bit before. Am not a member of the miners' union here. Have been at Virginia City, Nevada, and Bodie.

Cross-Examination.

I was as close to Mr. Albinola as I am to you; it was near one o'clock.

Testimony of Charles Russell.

(Called by Defendants.)

Reside at Wardner; occupation, sawyer in a sawmill located at Cataldo. On the morning of the 29th of April I was at Cataldo. Came up that day on the regular

train and arrived on the regular train about 12 o'clock. Am acquainted with Mr. Albinola. Saw him that day when I was looking for my children. I was down on the Bunker Hill road; he came from toward Wardner; that was about half a mile from the mill where I saw him; he and two or three other men came down and wanted to know what was going on. Told them I did not know. That was about two o'clock; they had commenced to move away from the mill when he came down. He was coming from the opposite direction from the mill. That is all the conversation at that time. He was not masked or armed or disguised in any way at that time; nothing unusual in his appearance.

Cross-Examination.

Did not notice that he had an American flag in his button hole; did not have one around him in any way. Think he had overalls on; he was half a mile away from the crowd; it was on what they call the Bunker Hill road; on the wagon road; it is not between the depot and mill; the depot is around the other way. I am not a member of the miners' union and never have been. I was not there earlier than 12 o'clock; came up on the regular train; generally come up every Saturday; work at Cataldo and live at Kellogg. Either come up Saturday or Sunday; sometimes quit work Saturday afternoon; did not work at all that day; I did not carry a gun that day. Was not at Kellogg before the train came in; when it came in I went home; live about a block from the station. I was down on that road looking for my children when I saw Albinola. I did not know where they were; they were

outside and supposed they were down there; I went as far as the flume, where the bridge crosses the flume, about a half mile from the mill, or a little less; heard there were guards back of the bridge, but did not meet any.

Redirect Examination.

I knew one of the parties with Mr. Albinola; his name was Dominick.

Testimony of Charles Russell.

(Recalled by Defendants.)

Know Louis Salla. Saw him that day in front of Albinola's saloon about one o'clock. He was standing on the sidewalk. It was just after they went down toward the mill.

Cross-Examination.

That saloon belongs to the defendant Albinola's brother. The saloon was closed at that time.

Testimony of John Dominick.

(Called by Defendants.)

Live at Kellogg; have lived there and Wardner about seven years; work in the mine, cut wood, and do almost anything. Was there the 29th of last April. Am well acquainted with Ed. Albinola. Saw him that day up in Wardner between one and two o'clock a little below the Montana saloon, between Tilley's stable and the schoolhouse. He was going up to Wardner. I was coming back from there. When we met he told me to go back and get a glass of beer, and I told him all the saloons

was closed, so we went down to his brother's house. Started on the direct road to his brother's house. The first man I met that I knew was Charlie Russell. We just asked him what was going on down at the mill. We went as far as the Bunker Hill bridge, where the flume crosses over, and there they stopped us. Did not know any of those parties. Then we went down close to his brother's house; there is a wagon road goes down to his house right on the end of the bridge. Mr. Albinola was not masked or armed; there was nothing unusual about his appearance. Am a citizen of the United States.

Cross-Examination.

I have worked underground. About five years ago was a member of the Wardner miners' union. Am not a member now, and have not been for about three months. Quit the job and the lodge at the same time. Since then have been out on Pine creek. Have been arrested and was in the bull-pen about three months. I left home about 8 o'clock on the morning of the 29th and went out in the hills on the other side of Kellogg, prospecting around there; came back at noon. I was just walking around the hills. Came through Albinola's claim and got to the station a little while after the train got down from the canyon. The people just got off the train at the time I got in there. Then I went up to Wardner. Stopped about five minutes at Mr. Albinola's saloon. That saloon closed up there after I left. There was quite a crowd there that day. Left the station immediately after twelve. Saw Albinola between one and two o'clock on the road. He was going up and I was coming down. I

had been to Wardner. It was between an hour and a half and two hours after I left the station, and it would be about that time after the train came in that I saw Albinola. He had no gun when I saw him and did not have any before, because I asked him if he had used a gun and he said "No," he didn't have any business to use any. We both came down to the junction and went as far as his brother's house and I went up to the station. When I got half way between Mr. Albinola's house and the station I met Mrs. Beautti, and she told me to help carry a little child on the other side there.

Testimony of Thomas Heney.

(Called by Defendants.)

Reside at Wallace, Idaho; am a miner; have been engaged in mining until about three years ago. In the years 1897 and 1898 I was sheriff of Shoshone county, and since then I have not done much of anything except looking after some prospects and properties. On the 29th of last April I was in Wardner, Idaho. The town of Wardner is located about a mile and a quarter south of Kellogg, on what is called Milo Gulch. The mines are located a quarter of a mile farther south, about a mile and a half from Kellogg, and the Bunker Hill mill is situated about a mile and a half or a little over west of Kellogg on the railroad track. Kellogg is the railway station. It is about a mile and a quarter from the railroad station to the postoffice in Wardner, between that and a mile and a half. I was appointed a deputy sheriff and sent down to guard at the Bunker Hill mine and a few days before the 29th. Saw the defendant Dennis O'Rourke on that

day a little before one o'clock near Joe Tilley's livery stable in Wardner. I went down to what they call the Montana saloon at the lower end of town, and notified them to close up, and just as I stepped outside the saloon I saw Dennis O'Rourke coming up, just opposite Joe Tilley's livery-stable. I ordered the saloons in Wardner to close if there was any crowd came up. Most of them closed, anyway. After that I went to Kellogg with Dr. France and a butcher, a man by the name of Miller, and two or three others. Dr. France asked me to go along with him. He said he did not like to go alone.

Cross-Examination.

Was not subpoenaed in this case. Came down here on private business. Have been here a couple of weeks; came here a day or two before the court met. Made a trip over here to Idaho county and was on my way back. Did not stop on business connected with this case. Sheriff Young sent me to Kellogg; said he believed they were having some trouble there, and for me to go down and stay there; to keep things quiet and prevent any trouble. The order came from the mine and the sheriff told me to go down and see the foreman and be subject to his orders. Received pay from the county for acting as deputy sheriff. Went from Mullan to Wardner on the 26th of April. Was at Mullan attending to some business; have property there, and got word from the sheriff to go to Wardner. Found everything quiet went I got to Wardner; nothing unusual. Got in there on the 2:30 train. I believe there had been unusual occurrences there that morning. I was in Wardner the morning of the 29th when

the train came in; ordered the saloons closed, and made two or three trips to the mine. The sheriff ordered me to close the saloons by telephone from Wallace. The under deputy ordered me to. He did not tell me the train was coming. He said there was a crowd of men there and that they were going to Wardner. I supposed they were walking and did not know they were coming on a train. Did not expect they would be down for two hours. There was no regular train at that time. Did not go to the station; was expecting the crowd to come up to Wardner. Afterward went to the station with Dr. France. I went to the mill from the town; did not go down to the junction, and when we came back from the mill up town there was nobody around the junction. The crowd had gone. Did not get back to the junction until about three or half-past three. I was sent there by the sheriff to guard the mine and I stayed there. When I saw O'Rourke it was pretty close to one o'clock; he was coming up town from the station or from his house. Did not talk to him. Was probably a block or a block and a half from him. I was formerly a member of the miners' union. Did not come here to work on this case and have not been working on this case. Have not denounced the prosecution of this case or expressed sympathy with these defendants. May have talked about it as the matter came up with other things. No one ever heard me denounce the efforts of the Government in this case, and have not denounced the prosecution of these men. I have criticised the action of some of our State officials in holding men there all summer without a trial, and have criticised the men they call "spotters" up there.

Redirect Examination.

Was arrested on the 23d of June and released on the 3d day of October.

Testimony of Mrs. Bridget O'Rourke.

(Called by Defendants.)

Reside at Kellogg, Idaho; have lived there about nine years. Was there the 29th of last April; am the mother of Dennis O'Rourke, one of the defendants. He stayed at our house the night of the 28th of April; he got up between nine and ten on the morning of the 29th; he ate breakfast and remained there while I was in the house. I went to Wardner somewhere about noon; a little after noon, I think. I got him his breakfast and left him in the house when I went away, and did not notice anything unusual until I got to a little below the postoffice, when I heard an explosion and met some parties, one of whom was Mr. Jessiers. After I heard the first explosion I went into the postoffice and asked for my mail, and then came down the street to my two children that I had left at Carter's on my way up. Saw Dennis O'Rourke again just after I came down from the postoffice; that would not be more than ten minutes from the time I heard the first explosion. Am acquainted with the defendant Francis Butler. Have known him ever since he was a boy going to school. Saw him that day. He came to our house some time between 10 and 11 o'clock from Wardner. Before he came in he stood outside talking to some one, and then came in and asked me to press a suit of clothes he had. I told him I was going up town and I

would leave him the ironing-board and he could press them himself, as he was in the habit of doing sometimes before, but I would do the mending to be done. He had the clothes with him at the time and laid them on the table; he was not masked or armed or anything unusual. There was no rifles of any kind around my place and never had been to my knowledge.

Cross-Examination.

Left my house about noon and went to the postoffice. I went up to do some shopping. Left my children at Mrs. Carter's to take care of them until I could do my shopping; I delayed there a few minutes and went on to the postoffice. On my way up I heard the explosion, before I did the shopping, and when I heard there was some trouble came down to Mrs. Carter's to get my children. It would be more than half an hour after I left home before I heard the explosion on the way up. Mr. Butler had been stopping up to Mrs. Carter's. I heard Dennis come in the night before. Could not exactly say what time; know it was late. It must have been after 12. They always come in late when they are not working. Would not be positive what time it was. He stayed home all day and got up between 9 and 10 the next morning. He went away from home after the 29th; I would not be positive what date, because he was not working at the time and was running around a good deal with the boys. He would go to Wallace and come back, and maybe go away another day. Think it was a couple of days after the 29th he went. He told me he was going to Wallace.

Testimony of Katie O'Rourke.

(Called by Defendants.)

Reside at Kellogg, Idaho, but at present am engaged at Gem teaching school, at present. My home has been at Kellogg for about nine years, although I have not been there all the time. Am a daughter of Mrs. O'Rourke, the preceding witness, and a sister of Mr. O'Rourke, the defendant. Was at Kellogg on the 29th of April last part of the time. Saw Dennis O'Rourke that day. I went up town in the morning and at that time he was not up, but was when I came back home. I had gone up to return a hat to the store, and when I came back he was up in the house. My mother went up town in the afternoon or about noon, and I went with her. I was with her all the time she was up town and with her when she met Dennis again. We went to the postoffice and on our way down we met him; it could not have been more than ten minutes, as soon as we came down, after the explosion. Am acquainted with Francis Butler. Saw him that day. He had roomed at our house previous to that time; had made his home there. On the 29th of April Mr. Butler's occupation was working for a newspaper, the "Idaho State Tribune," of Wallace. He came into our house after I came from Wardner in the morning, and I heard him speak of going to the junction; I thought it was he, and he left the house. He was not there, to the best of my knowledge, at the time my mother and myself went up town. Did not see him dressed in any unusual manner or have any gun or mask at any time.

Cross-Examination.

I do not know whether my brother or Mr. Butler was a member of the miners' union. The first time I went up town I do not think it was before nine o'clock. My brother was in bed at that time. I went to town and came back immediately. Went up again about noon-time with my mother, but am not positive of the exact time. My brother was at home when we left. Am positive of that. Heard the explosion when we were up town. When we came back we met him somewhere near the school-house—I think probably on the Wardner side of it. Could not say what direction he was coming from. There were a number of people on the street going and coming and standing, and I met him. It was very shortly after the explosion. It could have been more than ten minutes after. Mr. Butler was stopping over the Montana saloon that belongs to Mr. Carter; that is in Wardner in the lower end of town. Mr. Butler came into our house after I came from Wardner the first time; I was at home when he was there and saw him afterward in the afternoon at Carter's.

Testimony of Mike Carter.

(Called by Defendants.)

My residence is Wardner, Idaho, and occupation at present is a liquor dealer. Have resided there two years and have been engaged in various kinds of business. Am acquainted with Dennis O'Rourke, defendant in this case, and know him intimately. He was always in the habit of coming in and out of my place in the evening. I have

a pool-table there and he used to play pool with me a whole lot. The night of the 28th he was in my house about the same as usual. He and I played pool a good part of the night together. I generally put everybody out about 12 o'clock and close up. Dennis left that night at the usual closing-up time. I did not see him again until the next day in the afternoon. I heard the explosion and rushed out of doors to see what was going on. There were quite a few people in the bar-room drinking—four or five people; and I came back and went to step behind the counter, and saw Dennis O'Rourke where the lunch was behind the counter, getting a piece of meat and bread for himself. That was pretty soon after the explosion. Am acquainted with Francis Butler; he roomed at my place, the Montana. I keep rooms for lodgers. I always understood him to be a kind of a book agent and newspaper man. Saw him on the morning of the 29th when he came downstairs into the saloon. I generally get in about ten or half-past ten; am not limited to any time to be there. I went into the cellar about ten o'clock to stock up for the day; came back from the cellar and met Butler; he came over to me as he came downstairs; came out through the back room and into the saloon, and said, "Please, Mr. Carter, will you let me have a paper to wrap this with; it is some clothes," and he went down to O'Rourke's. Am acquainted with the defendant, Mr. Burris. On the 29th of last April he was tending bar for me. He was tending bar all day except while he was having dinner. He was my regular bartender at that time and had worked a month before that. As far as I am aware he was there attending to my business that

day. I never heard different. I didn't leave there myself but what he was there when I came in. Nobody ever told me he was out of there. Sometimes my bartender would go off for a few minutes to eat a meal, and some of the miners or roomers would stay around, but I do not know he was out of the place. I would know it if the place was neglected.

Cross-Examination.

My saloon was not closed that day. Mr. Heney came in and notified me to close if there was any excitement or any crowd of men. Anybody could come in and get a drink of beer. Was not playing pool with Dennis O'Rourke steady the night of the 28th; would go and tend bar and go back and play, and wait on customers. Others came in and played pool. A merchant across the ditch, Johnnie Tony, and his brother came in. Johnnie and I played that night. People came in and out. O'Rourke was not there when I closed, because I put him out and locked the door, and went home and he went home. He was on the sidewalk when I locked the door; I told him to go out. There was no one else there. Miners come in my saloon, and members of the union. I got up about 10 o'clock on the 29th. Saw Butler shortly after I made my first trip around the cellar. He asked me for a paper to put the bundle in. The bundle was a piece of tweed of some kind. Don't think I saw him again until afternoon. Heard the explosion and ran out; then came back in the saloon and talked with some men there and went around behind the counter and looked up toward the door where the lunch part of the counter is,

and saw Dennis behind the counter cutting a piece of pork to make a sandwich from. Charley Burris was behind the counter, the defendant there. He was there all the time. I do not see how he could leave there. There was no other barkeeper but him. I was not there all the time myself. I was in and out of the cellar; maybe away 10 or 15 minutes. That day I did not go to dinner until about three o'clock, I think. The bartender was not out of my sight for over 15 or 20 minutes at any one time from the time I first come on about ten o'clock in the morning until three in the afternoon. Saw Dennis O'Rourke the day after the 29th and played pool with him.

Testimony of John Keating.

(Called by Defendants.)

Reside at Wardner, Idaho; occupation, miner and prospector. Have been in the vicinity of Wardner and Kellogg about 13 years; was there the 29th of last April. Am acquainted with Charley Burris. Saw him on that day. Went up town that day about nine o'clock in the morning, and went into Mr. Carter's, and Mr. Burris was in there tending bar and we had a drink. I stayed there until about half-past twelve and he was there all the time. When I had been in there about an hour and a half I heard somebody calling me by name, and I went out on the street, and he asked me if I would tell him how many men was going up that road toward the Tyler; they were coming from the Stemwinder. We were standing on the crossing between Carter's and Toner's, and he asked me if I could count them, and I counted 51 men as

they passed by a snow bank there. They were passing toward a shed of the tramway on the road.

Cross-Examination.

Stayed in the saloon all the morning; was in and out between there and Toner's. It may have been after nine when I went there, but I am positive it was near one when I left there; was in the street, on the sidewalk and in the saloon all that time. Was over on Toner's doorstep maybe half an hour at the time those men were crossing the mountain. They were coming from the Bunker Hill property toward the Tyler property on the wagon road; then they left the wagon road and went up on the Tyler claim and sat down; they were coming from the Bunker Hill Mine and going in the opposite direction; counted 51 of them; about 20 of them had guns or pistols and they had dinner buckets. Saw Burris from that time until I left and then saw him when I came back about 2 or 3 o'clock. He was not absent from that saloon. I was there when Tom Heney gave the orders to close the saloon; I go there once in a while evenings; am acquainted with Burris. Am not a member of the miners' union and have never been at any place, and have never been a member of any organization. Burris was not away from the saloon two minutes.

Testimony of Katie Butler.

(Called by Defendants.)

Reside at Wardner; have lived there two years in June; was there on the 29th of last April. Am acquainted with the defendant, Francis Butler. Saw him on that day at

the junction. Could not state what time it was that I saw him, because my baby was awful sick and I never looked at the clock all day, but it was just at the time of the last explosion. He walked up the sidewalk from the direction of McKinniss' Hotel; he was close to Mrs. Bussey's store; I was on the raise of the hill and he was on the sidewalk, walking up. He had no gun or mask. He wore a pair of tan shoes, light pants, and a black coat and vest, and a white hat with a black band on it. He had no rifle that I saw. He had an overcoat that I never seen him wear before. He was not dressed in any manner different from his usual custom in that style of weather. Did not see any old hat sticking out of the coat pocket or any of his garments. The day was cloudy and very cold and the wind blew. It was a day a person could not very well go without a wrap of some kind, or an overcoat. It was a cold day.

Cross-Examination.

My husband is in Wardner; he is teaming at the present time. He is a member of the miners' union; has been in the bull-pen up there. I did not walk up the street with Francis Butler. Went to the junction that day looking for my husband. He went to work on the morning of the 29th and his foreman told him there was no work; he had gone down to the junction and I went looking for him, because I saw unusual excitement on the street and I wanted to know what it was, and where he was. I was anxious to know. I went on the raise of the hill and Mr. Butler was on the sidewalk, and I called to him to ask where my husband was and could not make him hear, so I

started on. I could not get to him; there was a barbed wire fence. I did not see him after that. I was about as far from him as I am from you; maybe not that far; that was just at the time of the last explosion; there was a very cold wind that day.

Testimony of Maggie Skinner.

(Recalled by Plaintiff.)

Was present in court this morning and saw the witness Orlandena on the stand. Saw him on the 29th of last April. He passed by the house in the forenoon, going down the Wallace road; don't know exactly what time, but it was sometime after eight o'clock. He was going in the direction of Wallace. He was in the company of others.

Cross-Examination.

He could not have followed that road or crossed that road and gone to Wardner; that road comes from Wardner. Don't know where he went after he passed the house. He has been in the habit of passing our house for some time past. Have noticed him for 2 or 3 months passing by. He generally went up and came down in the evening and he was going down that morning. Could not fix the time; it was before the arrival of the train; could not say how long before; he could have reached the station by the time the train arrived. Don't know how far it is from our house to the station. See Mr. Orlandena pass the house two or three times a day; he would go up and then come down; generally come down in the evening; sometimes he would not; he was not in

the habit of carrying a dinner bucket; don't know what his business was going by our house. When he passed our house going back and forth I never saw him in a working suit, and never noticed him carrying a dinner bucket; don't know where his cabin was.

Testimony of Sophia Moffitt.

(Recalled by Plaintiff.)

I know Mr. Russell, who was on the stand this morning; was in court when he testified. I know where he lives; we live across the street from him; saw him on the 29th of April coming up from the depot on the walk, and crossed the street going to his house between 9 and 11 o'clock before the arrival of the train.

Cross-Examination.

Could not state the exact time I saw him; between 9 and 11. It could not have been between 11 and 1 o'clock. It was before the arrival of the train. It might have been half an hour or an hour before the train arrived. I mean the train from Wallace. I was standing in my door. He was just across two streets. The street makes a fork right there. I live right where the Bunker Hill road goes from the main road, going to the depot. Am not positive whether my daughter was there in the door or whether she was standing back a little ways, but we made a remark at the time that it was Mr. Russell coming home. My daughter was in the house within speaking distance, but am not positive whether she was in the door or not. Did not look at the clock. Have seen Mr. Russell com-

ing home on various occasions. He is a sawyer and carpenter by trade also, and is away from home a great deal. He generally returns on Saturday or Sunday. Have seen him frequently and noted his arrival; don't know really what time he generally gets home. I believe he was away the greater part of that week at his business, which I believe is at Cataldo. Don't know how he gets home from that place. He has a family, a wife and two boys 12 and 14 years old. I made a comparison between the time I saw him and the time the train came in, because I left home as the train arrived and I was not near ready to leave at the time he arrived. It may have been half an hour before the train arrived. That is as close as I could come to it. The train arrived a little after 12, and Mr. Russell reached home, according to my judgment, about half past 11.

Testimony of J. H. Forney.

(Called by Defendants.)

I was acting county attorney for Shoshone county for quite a time, and think I was appointed about the 29th of May. It was at the beginning of court up there. I directed the prosecution of the case that was tried there at Wallace and directed the action with reference to all State indictments. At the close of the Paul Corcoran case an order was made by the Court to seal up all the testimony taken at the inquest on the bodies of Cheyne and Smith, before the coroner. That was done upon mymotion. Since that time and during this trial I appeared here to oppose the granting of an order by this court for a subpoena duces tecum to the clerk of that court to bring that testi-

mony here. I appeared here specially for that purpose on the grounds that this subpoena was directed to the officer in whose custody this testimony was, in Shoshone county, and as it would materially interfere with the prosecutions in that county, which are now pending. There are no cases being tried there, but there was quite a number of indictments. I think some of these defendants are indicted also. I opposed it on that ground; the publication of that testimony would expose the entire line of prosecution in behalf of the State as to these defendants, a large majority of whom are not in custody.

Testimony of Mrs. Charles Russell.

(Called by Defendants.)

Reside at Kellogg, Idaho; have lived there five years this coming January, and was there on the 29th of last April. Know the defendant Francis Butler by sight very well, but am not personally acquainted with him. I saw Mr. Butler that day as I was going down to see the mob with a couple of other ladies; he was at that time about Bussey's store and there was another gentleman with him; two of them, but only one I know, Mr. McRae. Mr. McRae stopped and talked to his mother. We met Mr. Butler going up, and after this gentleman had stopped and talked with his mother a few minutes we went on down; stopped at the corner of Mr. McKinniss' to see the mob, and at the time we reached the postoffice Mr. Butler was in there; was inside the postoffice. We stayed on the porch, and, as far as I know, Mr. Butler was in there when we left. The mob had already formed; the Wardner men had been called to the front and we stood there until they

formed in line, and we went away after that; but I do not know that Mr. Butler went out of the postoffice; he could not have passed before me without me seeing him. I am speaking of the Kellogg postoffice, opposite the depot. Don't know whether Mr. Butler and these other young men came back after us. I know by the time we reached the postoffice Mr. Butler was in there. Do not remember of seeing the other gentlemen in there at the time. That was after 12 o'clock and after the order had been given for all Wardner men to go to the front. I am the wife of Charles Russell. My husband came home on the noon train from Cataldo that day at 12 o'clock; the train was due at that time. I should judge it was about half-past 12 when he got to the house. It is about 12 miles from Cataldo to Kellogg.

Testimony of Samuel McDonald.

(Called by Defendants.)

Reside at Wallace; occupation, prospector and miner. Have lived in the vicinity of Wallace for 11 years. Formerly followed false timber work. Am acquainted with Mr. Martin, the superintendent of a mine at Sunset Peak. Am acquainted with Arthur Wallace. Took a trip to Sunset with Mr. Wallace in the first few days of May. We went to the place run by Mr. Martin. There was no particular conversation that I know of between Mr. Martin and Mr. Wallace. The occurrences of the 29th of April were discussed; I was discussing it myself as well as they. Mr. Martin asked him if he had been down there and he said "yes," that he was eating dinner at Mrs. Burke's

at the section-house when the mill went up. I saw Mr. Martin after that in Wallace; could not say exactly when. He was sitting on an empty beer-keg in front of a saloon there, and saw me coming along and beckoned to me to come where he was; he asked me if I remembered the man that went out to Sunset with me, and I told him "yes"; he said to tell him to keep out of the way, that they were looking for him. I conveyed that information to Mr. Wallace when I met him. I told him the words Mr. Martin told me, that he had better get away. Mr. Wallace was a miner, and he told me he was a blacksmith and metallurgist, and I told him there might be a show for him to get on as a blacksmith for Mr. Martin.

Testimony of Jane F. Van Gilder.

(Called by Plaintiff.)

Reside about three miles and a half from Wardner, on the Wallace road; have lived there 14 years. Was in that vicinity the 29th of last April; left my home at 11 o'clock and crossed the Northern bridge at the end of the flume, and was going on to Wardner with a basket of eggs and butter, with my little boy, 11 years old. My girl left me across the bridge. There is a side track used to haul timber there, and when we got to the bottom of that switch we began to meet the men. My little boy and I began to count them. I thought there had been a miners' union meeting and they had been down to Wardner all night; they had little paper parcels under their arms and I thought they had their night shirts. At the crossing, near Mrs. Brown's where we cross the river, I met Mr. Burris; just below the crossing; below that there is a

curve, and the men were coming two and two, excepting one man who was carrying a rifle; he was alone and had no wraps on him; further down where they cross the road that goes to Wardner, at the end of a lane, there was 20 more coming over around the wagon road; they did not come down by the junction; that is what is called the Wallace road; the track that runs from the junction to Wallace; that was before the train came in from Wallace; these men were going toward Wallace. Saw Tom Cameron and "Dunk" just below the trestle. When we finished we counted 245 going up the track; we counted all we saw. Mr. Burris that I met is one of the defendants here. He had something on his shoulder; could not say what it was; had his coat over it. That was about half-past 11, I guess; was not noticing when I passed him, we were counting, until he said to me, "How do you do," and I turned around and made answer, "I do not say how-de-do to such men as you," and turned and walked on. He looked at me and I looked at him. We then went down to the junction and crossed over to Mr. Gay's and delivered the butter and eggs there; then came out to the track and just as I came out from the house saw the engine coming down with all the men on it and the men on the flat-cars. When I got to the track the passenger had come up and their train was so close you could not pass the track up to Wardner. Went back home that evening at 4 o'clock. On the way I found these masks, pieces of calico, and one was a piece of bunting with a United States flag, and one a black one. I carried off six altogether, and there was old clothes and overalls and things strewed up

and down where they had throwed them as they had gone home.

Cross-Examination.

My daughter assisted me in crossing the bridge, because the water was high and I had two heavy baskets; she always takes hold of my arm to cross the bridge. The place I saw Mr. Burris is a good quarter of a mile from that bridge. They were not walking so thick there; they were two and two, and they all hung their heads and hardly raised their faces. Mr. Burris did not hang his head; he looked pretty brave at that time; looked as if he had taken quite a little nerve tonic, pretty bold; he said "How-de-do," and I said, "I do not say how-de-do to such men as him"; I looked back at him and he looked at me. I looked to see what he was carrying, but could not because the men were so close that I could not see him again. Have known Mr. Burris ever since he ran a paper in Wardner. He came to my house five years ago this summer, when he was out fishing, and asked for a pick to dig worms. On the 29th of April he had on a soft hat, dark black, and a dark black suit. I did not notice anything peculiar about it at all; we were not paying any attention to the men's dress; my boy is a great hand for counting, and he said, "Mamma, lets count them," and we were busy counting. I was as close to Mr. Burris when I observed him as from there to that table; there was two and two walking on the broad gauge and I was walking on the other side of the track; they were on my left-hand side; the grade is high and you cannot get off the track unless you walk outside of the ties. Mr. Burris was right side to me and there was another man by the side of him. Saw lots of

men in the party whose faces I knew, but didn't know their names. None of those men were masked. About two-thirds of them carried little paper parcels. There was one man had a rifle and a belt around his waist with cartridges in; he had a jumper inside the belt and had no coat on. He was about 5 feet 6 or 7. Mr. Burris did not have his coat on; it was over his shoulder; could not say what he had with him; the coat was on the opposite shoulder to me; saw he had something under his coat; he had nothing in his hands; did not see anything under his coat besides his shoulder; these men were going away from the junction toward Wallace. We have to go to the junction to get on the train, and my place is right up across the company's flume; we call it a mile and a half. It was 11 o'clock when I left the house and it is 8 or 10 minutes' walk from my house to that Northern bridge. The train had not arrived when I saw Mr. Burris and did not come in until I got down to the junction and turned to come back over again. We have to go over to the old junction and then it is about eight minutes' walk from where I was back to the passenger track. Before the arrival of the train from Wallace there was no excitement in the vicinity of the junction; there was not a soul to be seen. The men with Mr. Burris did not go to the junction. They went up to meet the train that came down from Wallace, and they all came in standing up on the cars. There was no train that morning ahead of the one which carried the armed and masked men. My husband has always been a green-grocer; he is in Alaska; he never worked in the mines in this country; he has always raised

vegetables and run a green-grocer wagon. Have not worn glasses until very lately.

Testimony of James Pipes.

(Recalled by Plaintiff.)

Have been on the witness stand before; testified in my direct examination that on the 29th of April, in company with my son and some others, I was placed under guard by those men, and that I overheard some exclamations made by parties close to me when the mill went off. Am not acquainted with an Italian by the name of Orlandena, but know him by sight. He is called "Big Pete" up there; don't know what his right name is; he was down here; I saw him that day; when the main part of the mill blew up he stood about the third or fourth man to my left and he was among the men that cheered when the mill blew up; when I first saw the mill begin to rise, and felt and heard the explosion, I heard some one at my left say, "Go it, America," and looked and saw some men along there, and heard such exclamations as "Down with America," "To hell with America," and such things as that, right along the line there, and looked at those men very closely on that account; he could not have been further than from here to that desk from me.

Cross-Examination.

Among the persons right there on that occasion I only identified two; one was called Big Pete, the ore loader, and another was a tall man, with a pock-marked face, named Cazzaglio. Later on I identified a man by the name of Wills. Do not remember identifying anybody

else. Did not give testimony before the coroner's jury. Testified in the Corcoran case at Wallace in July; there was possibly another man I identified; but do not know for certain that I identified anyone except those three men. Don't think there was anything said in the Corcoran case. Was asked then who I identified on that occasion; do not remember what my answer was. It may be a fact that I did not speak then of identifying Orlandena; when I was questioned here last week I believe I identified Cazzaglio. I do not remember saying anything about Pete, the ore loader. I was asked the question as to all persons that I identified on that occasion and I answered by naming Cazzaglio; the reason I mentioned Cazzaglio was that I had been subpoenaed on his case, and there was nothing said to me about the other men, so I thought there was no need of saying anything about it. I remembered all the time of seeing Orlandena, but didn't suppose there was any need of saying anything about him. The reason I didn't mention Orlandena was because there were a great many persons there that have not come directly into this; that I did not suppose I have anything to say about. If I had been told I had to identify every one I noticed there I should have mentioned it. I did not know the inquiry extended to all those persons who were in the masked and armed party, and the party who took you prisoner and detained you. I think the question was if I identified anyone else at that time. Since I was on the stand the other day I have mentioned to Mr. Crawford and several other gentlemen concerning the names of persons whom I identified as acting with that armed party. When Pete got off the train at Colfax the other evening

I said to several gentlemen standing there, "Is it possible that man is going to testify in this case?" I spoke to Mr. Cozier about it this morning, but not before. Had not spoken to anyone else connected with the prosecution about it. Could not tell how many of that party were cheering; maybe five and maybe ten, standing to my left, cheering, with their hats in the air. The noise of the explosion did not interfere with hearing what was said, because they could speak before we could get the explosion. We could see just when the thing began to rise. There were several explosions. The first expression was "Go it America," and then it was "Down with America" and "To hell with America"; the air was full of such expressions; could not swear Orlandena used any of those expressions; he was with the crowd that did the cheering, with their hats in the air; could not say whether all those to my left joined in the expressions which were used; could not say how many; there was a great deal of hallooing and hurrahing. I was not as much excited as I am at the present time; shortly after that there was considerable shooting; was not particularly interested in those things. Made up my mind the mill was going to be blown up and took it as a matter of fact; but when I heard the men make such expressions as that, I did begin to get excited, and I says, "If anything is going to happen to us, we might just as well keep cool." We did not dare to be excited that day.

That JOHN CLARK was called as a witness for the prosecution, and being duly sworn testified that he was a member of the miners' union at Burke, and was then

asked by the prosecution, "What official position, if any, did you occupy in that union on the 29th of April?" To which question the defendants objected, upon the ground that the same is irrelevant and immaterial, and does not tend in any degree to prove the charges of the first, second or third counts of the indictment herein, and upon the ground that there is as yet no evidence of any conspiracy of the character charged in the first count of said indictment, and that evidence of other conspiracies is irrelevant until that is shown. The Court thereupon overruled said objection and the witness answered that he was recording secretary of said union. To said ruling, and before said question was answered, defendant then and there duly excepted.

That said witness Clark was further asked by the prosecution, "State whether or not that is a union mine; that is, the Standard mine employs union labor—members of the union." To which question the defendants objected, upon the ground that the same is irrelevant and immaterial, and does not tend to prove any of the counts alleged in the indictment; and upon the ground that there is as yet no evidence of any conspiracy of the character charged in the first count of said indictment, and that evidence of other conspiracies is irrelevant until that is shown. The Court thereupon overruled said objection and the witness answered in the affirmative. To said ruling, and before said question was answered, defendants then and there duly excepted.

That said witness Clark was further asked by the prosecution, "Mr. Clark, will you state where the different unions are located in the Coeur d'Alene country?" To

which question the defendants objected, upon the ground that the same is irrelevant, and for the reasons last above stated. The Court thereupon overruled said objection and the witness answered said question. To said ruling, and before said question was answered, defendants then and there duly excepted.

That said witness Clark was further asked by the prosecution, "State if these unions are connected together or belong to any general union organization?" To which question the defendants objected, upon the ground that it is immaterial and irrelevant, and has no tendency to prove any of the charges contained in the indictment, and that the record, if there is one, is the best evidence. The Court thereupon overruled said objection and the witness answered said question. To said ruling, and before said question was answered, defendants then and there duly excepted.

That said witness Clark testified that he was in Burke on the morning of the 29th of April and saw a few men around and in the union hall, and that he entered said hall, whereupon said witness was asked by the prosecution, "State what occurred there." To which question said witness answered, "They were standing around talking about waiting for the train coming up, when we were all going down to Wardner." Defendants thereupon moved to strike out said answer, upon the ground that it is irrelevant as against these defendants, and that there is not yet a prima facie case made that the defendants were engaged in any way or allied with the persons referred to by witness in any conspiracy or agreement. The

Court thereupon denied said motion, to which ruling the defendants then and there duly excepted.

That said witness Clark was asked by the prosecution, "You may state what their object was in going to Wardner." To which question defendants objected, upon the ground that defendants are not connected in any way with any agreement with the persons referred to by witness, and the declarations of persons in the absence of defendants is incompetent until a prima facie case of conspiracy is shown. The Court thereupon overruled said objection and the witness answered said question. To said ruling, and before said question was answered, defendants then and there duly excepted.

That said witness Clark proceeded to answer the question last above set forth, and said, "That morning, when we came off of the night shift, we was informed we were to go to Wardner." Whereupon defendants objected to what witness had been informed upon the ground that it is incompetent, irrelevant, and immaterial, which objection the Court thereupon overruled. To said ruling the defendants then and there duly excepted. Said witness further answered in reply to said question, "To use moral suasion with the Bunker Hill and Sullivan Mining Company to get them to give their employees the raise of wages demanded, and fix up everything in accordance."

That said witness Clark was asked by the prosecution, "From whom did you get that information, a member of the union?" To which question defendants objected, upon the ground that even if witness did get the information from a member of the union, it does not follow that every member of the union was a member of a conspiracy

to do an unlawful act. The Court thereupon overruled said objection, to which ruling the defendants then and there duly excepted.

That said witness Clark in reply to the last question set forth above said, "No, sir; I do not know just how the information got to the mine, but I was told by the miners," which answer defendants thereupon moved to strike out, upon the ground it does not tend to prove the defendants were members of any conspiracy to an unlawful act. The Court thereupon denied said motion, to which ruling the defendants then and there duly excepted.

That said witness Clark was asked by the prosecution, "Now, Mr. Clark, I desire you to state what you did that day, so far as the events of that morning are concerned, that is, going to Wardner." To which question defendants objected, upon the ground that it is irrelevant what the witness did, or what any other person did in the absence of the defendants until a conspiracy prima facie is shown. The Court thereupon overruled said objection and the witness answered said question. To said ruling, and before said question was answered, defendants then and there duly excepted.

That said witness Clark testified he got into a box-car attached to the train bound for Wardner, and was asked by the prosecution, "State how you happened to go into a box-car." To which question defendants objected, upon the ground that it is immaterial and irrelevant, and that it does not tend to show any conspiracy, and is not evidence against defendants, or either of them. The Court thereupon overruled said objection, and the witness answered said question. To said ruling, and before the ques-

tion was answered, defendants then and there duly excepted.

That said witness Clark was asked by the prosecution, "State why you did not get into the passenger coach." To which question defendants objected, upon the ground that it does not tend to show any conspiracy and is not evidence against defendants, or either of them. And the defendant further objected to all questions of the same character upon the same grounds. The Court thereupon overruled said objection and the witness answered said question. To said ruling the defendants then and there duly excepted.

That said witness Clark was asked by the defense on cross-examination, "Did anybody talk to you about the evidence you should give on the trial of Corcoran, after you got to Wallace at any time? State what was said to you and by whom." To which question the prosecution objected, upon the ground that it is incompetent, which objection was sustained by the Court. To said ruling the defendants then and there excepted.

That said witness Clark testified on cross-examination that he knew Mr. Mace Campbell, and was asked, "Do you know whether or not he is a stockholder in the Bunker Hill and Sullivan Mining & Concentrating Company?" To which question the prosecution objected, upon the ground that it was incompetent, irrelevant, and immaterial and improper cross-examination; whereupon counsel for defendants stated that he expected to show that Mr. Campbell took the witness into the sheriff's office in Shoshone county, and by threats endeavored to induce him to stand by testimony which he (Clark) claimed he had

given under coercion and mistake before the coroner's inquest. Whereupon the Court asked, "To testify here as to what he testified elsewhere?" to which counsel for defendants replied, "No, but what he should testify in the trial of Corcoran." The Court thereupon sustained said objection, to which ruling the defendants then and there excepted.

That said witness was asked upon cross-examination:

"I will ask you if prior to the trial of Paul Corcoran, and on the day when you were called there as a witness on that trial, Mr. Mace Campbell did not address you in the sheriff's office and tell you that it would be better for you to stick to what you had said before the coroner's jury. Did you not testify in the District Court of the First Judicial District, in and for Shoshone county, on the trial of Paul Corcoran, as follows:

Q. Was there anything said to you about your testimony at any time since your second arrest?

A. No, sir.

Q. At any time? A. No, sir.

Q. Not to-day? A. Well, yes.

Q. When?

A. This morning I was approached by one man down here.

Q. What is his name? A. Mace Campbell.

Q. Go ahead.

A. And he told me that it was better for me now to stick up to what I said down before the coroner's jury—"

Whereupon the prosecution objected, upon the ground that it is getting evidence in that case before this jury,

which objection was sustained by the Court. To said ruling defendants then and there excepted.

That the witness THOMAS AMES was asked by the prosecution: "Mr. Ames, I will ask you what relation the Wardner union bears to the other miners' unions in the Coeur d'Alenes." To which question the defendants objected, upon the ground that it is irrelevant and incompetent. The Court overruled said objection and the witness answered said question. To said ruling, and before said question was answered, defendants then and there duly excepted.

That said witness Ames testified on direct examination that on April 23, 1899, the Wardner miners' union passed a resolution appointing a committee to call upon the manager of the Bunker Hill and Sullivan Mining Company to see if he would acknowledge the miners' union and raise the wages and that the committee reported on the afternoon of that day. Whereupon said witness was asked by the prosecution: "What was the report of that committee?" To which question defendants objected, upon the ground that it was incompetent and called for hearsay testimony. The Court overruled said objection and the witness answered said question. To said ruling, and before the question was answered, defendants then and there duly excepted.

That the said witness Ames testified on direct examination that he attended a meeting of the Wardner miners' union held on the 23d day of April, 1899, at which a resolution was passed to go to the Bunker Hill and Sullivan mine at 6 o'clock and solicit members for the union, and

said witness further testified: "The meeting was closed then, and we all went to the Bunker Hill in a body to get the men that was still working in the Bunker Hill." Whereupon counsel for defendants objected to said testimony and to all testimony of a similar character, upon the ground that the same was incompetent, which objection was overruled by the Court. To said ruling defendants then and there duly excepted.

That said witness Ames was asked by the prosecution: "I will ask you to state briefly what took place on the 29th of April, came under your observation—commencing in the morning," to which said witness replied: "Well, do you want to know what I seen or what I done, or what?" Said witness was then asked by the prosecution: "Well, what you did and what you saw." To which question defendants objected, upon the ground that it is immaterial, incompetent, and irrelevant, and does not tend in any degree to prove the allegations in the indictment; that it is too general, and opens the door to the witness to tell about anything whether relevant or irrelevant. The Court thereupon overruled said objections, to which ruling the defendants then and there excepted.

That said witness Ames in answer to the question last above set forth, "Well, I went to Page's Hotel and found out what I could, in the morning, what was going on. In fact, I didn't find anything much, because no one seemed to know anything about it, only was to go to the depot at 11 o'clock to meet a train. Two or three of the boys told me not to go down—to stay there. I went into Mr. Page's hotel, Mr. Cox's store—." Whereupon defendants moved to strike out what the witness was told, upon the ground

it was irrelevant, incompetent, and immaterial, which motion was denied by the Court. The defendants then and there excepted to said ruling.

That said witness Ames testified that he supposed the train was coming down to bring the men from above, and was asked by the prosecution: "Did you have a statement from any member of the union that would lead you to believe it—cause you to believe it?" To which question defendants objected, upon the ground that it is incompetent, irrelevant, and immaterial. The Court thereupon overruled said objection, to which ruling the defendants then and there duly excepted.

The Defendants Presented to the Court the Following Motion and Affidavit (Omitting Title of Court and Cause):

State of Idaho, } ss.
County of Latah. }

Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Fred. Shaw, Mike Malvey, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, William Bundren and C. R. Burris, being each duly and severally sworn, each for himself, on oath deposes and says that he is one of the defendants in the above-entitled action; that the testimony of S. H. Hays, W. E. Borah, and J. H. Hawley is material to his defense in the above-entitled action, and he cannot safely go to trial without them; that they are residents of and within the district of Idaho; that he expects to prove by said S. H. Hays, W. E. Borah, and J. W. Hawley, all of the facts set forth in the

affidavit of J. L. Rivers which is hereto attached and made hereof, and in addition thereto that it was the purpose and intent to prevent these defendants and others who are indicted by the grand jury impaneled in the District Court of the First Judicial District, in and for Shoshone county, State of Idaho, from obtaining any information from the shorthand reporter's notes mentioned in Mr. J. L. Rivers' affidavit, so as to prevent said defendants from cross-examining the witnesses who testified before said coroner's inquest mentioned in said affidavit, and to prevent them from contradicting or impeaching said witnesses by the testimony contained in said shorthand notes; that he expects to prove by said witnesses that the testimony taken on the inquest referred to in said Mr. Rivers' affidavit was written out and filed with Mr. H. M. Davenport, clerk of the District Court of the First Judicial District of the State of Idaho, in and for the county of Shoshone; that the said S. H. Hays, W. E. Borah, and J. H. Hawley have had access at all times to said testimony; that said testimony was completed a considerable time before the commencement of the trial of Paul Corcoran who was tried and convicted in said court, and that the said testimony was not filed in order to prevent the said Paul Corcoran on his trial from having the benefit of the same in cross-examining of witnesses produced against him; that after the trial and conviction of the said Paul Corcoran, at the request of the said S. H. Hays, W. E. Borah, J. H. Hawley and J. H. Forney, the District Court ordered that the said package containing said testimony should be sealed and no one permitted to open it without an order of the Court, and that no certified copy should be made,

given, uttered, or issued by said H. M. Davenport, clerk of the District Court of the First Judicial District, but that the same should be sealed up so as to conceal the contents of said package, so as to prevent defendants, or any of them, or their attorneys or counsellors, from inspecting or copying said testimony, and the said county clerk has refused to give a certified copy or permit the defendants, or any of them, or their attorneys or their counsellors, an opportunity to examine the same or take a copy thereof; that said testimony is material to the defendant, and each of them, upon the trial in order to cross-examine several of the witnesses who appeared before the grand jury and who found the indictments in this case, and who are expected to be witnesses on the trial of this cause, in order to contradict and impeach said witnesses as to the testimony given before the grand jury against said defendants and each of them.

That the said shorthand notes are material to the defendants, and to each of them, to enable them to make their defense in this action; that several of the witnesses who attended and gave testimony before the grand jury were also witnesses on the trial of the said Paul Corcoran, and there testified to matters material to the issue, and which testimony given on said trial is contrary to testimony given before the coroner's inquest, and contrary to the evidence as recorded in said shorthand notes of the testimony, and that said testimony is material in order to enable the defendants to cross-examine, contradict, and impeach said witnesses as to the testimony given in the said Paul Corcoran trial and the testimony given before the grand jury which found the indictment filed herein;

that the testimony is required and desired, and is material to contradict and impeach the testimony of the following named persons whose names are endorsed on the indictment herein as witnesses, and were called and testified before the grand jury and against the affiant, to wit: J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joseph Phifer, A. M. St. Clair, Jas. B. Pipes and Jos. Kendall. Affiant further states that he is not possessed, nor has he under his control or command, sufficient means, and is actually unable to pay the fees of said witnesses, or any of them.

Wherefore, affiant prays the Court to order a subpoena duces tecum to be issued and served upon S. H. Hays, W. E. Borah, J. H. Hawley, and that he be required to bring with him and produce in this court the book or books containing the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joseph Phifer, A. M. St. Clair, Jas. B. Pipes, and Jos. Kendall.

Louis Salla.
Francis Butler.
John Lucinetti.
Denis O'Rourke.
Fred. Shaw.
Ed. Albinola.
Mike Malvey.
H. Maroni.
Charley Garrett.
P. F. O'Donnell.
Arthur Wallace.
William Bundren.
C. R. Burris.

Subscribed and sworn to before me this 28th day of October, A. D. 1899.

A. L. RICHARDSON,
Clerk.

Filed October 28th, 1899.

[Title of Court and Cause.]

State of Idaho,
County of Latah. } ss.

I, J. L. Rivers, being duly sworn, depose and say: That I acted as one of the shorthand reporters at the coroner's inquest, held at Wardner, Idaho, over the bodies of James Cheyne and John Schmidt, and as such reporter reduced to shorthand writing the testimony of the witnesses given at the sessions of the coroner's jury, at which I was present. That subsequently I was employed by the State of Idaho to report certain trials and proceedings growing out of the riot of April the 29th. That during July, 1899, the attorney-general, Samuel H. Hays, and other attorneys connected with the prosecutions at that time, at Wallace, Idaho, requested that all my shorthand notes taken by me at said inquest be turned over to them, and that they remain in their keeping, as the property of the State; that in accordance with their request I did deliver said notes to them, and on July the 29th the same were by Mr. M. A. Folsom placed in a trunk, with other papers of the State, at Wallace, Idaho. That at this time said shorthand notes are not in my possession or under my control, and have not been since the same were delivered by me, as above stated.

(Signed) J. L. RIVERS.

Subscribed and sworn to before me this 26th day of October, 1899.

(Sig.) A. L. RICHARDSON,
Clerk.

Filed October 28th, 1899.

The Court thereupon overruled said motion, to which ruling the defendants then and there duly excepted.

The said witness Ames was asked by the prosecution: "Was it not the talk among the members of the Wardner union that necessary force would be exerted to drive the non-union employees out of the camp, or prevent their working in the Bunker Hill and Sullivan—was not that the talk among the members of the Wardner union?" To which question the defendants objected, upon the ground that it is leading, incompetent, irrelevant and immaterial, and that their statements cannot bind the defendants. The Court thereupon overruled said objection, to which ruling defendants then and there excepted.

That said witness Ames was asked by the prosecution: "Would that rest in open meeting, any plans they might lay, or rest with a committee?" To which question the defendants then and there objected, upon the ground that the rules and regulations of the miners' union are printed and are the best evidence. The Court thereupon overruled said objection, to which ruling the defendants then and there excepted.

The witness ALBERT BURCH was asked by the prosecution on direct examination, "Mr. Burch, I desire you to commence with the week preceding the blowing up of the Bunker Hill and Sullivan mill and relate briefly the occurrences so far as the troubles between the Wardner union and your company are concerned." To which question the defendants objected, upon the ground that the question assumes the blowing up of the mill and that any testimony as to the blowing up of the mill is incompetent,

irrelevant, and immaterial. The Court thereupon overruled said objection, to which ruling the defendants then and there duly excepted.

Said witness Burch proceeded to answer the question last above set forth, as follows: "About the 19th or 20th of April I discovered some notices posted up, reading, as near as I can recollect it—." Whereupon the defendants objected to the witness stating the contents of a written notice, upon the ground that the absence of said notice has not been accounted for, and that it is irrelevant. The Court overruled said objections to which ruling the defendants then and there excepted.

Said witness Burch proceeded with his answer to said question as follows: "Wardner, Idaho, April 13th, 1899. At a regular meeting of Wardner miners' union, April 18th, W. F. M., held upon the above date, it was decided to request all men employed in and about the Bunker Hill and Sullivan mine to make application for membership in the Wardner miners' union immediately. (Signed) M. A. Flynn, Committeeman. That attracted my attention to the possibility of there being agitation in progress in the mine." Whereupon defendants moved to strike out the part of said answer as to what effect said notice had upon the mind of the witness, which motion was denied by the Court, to which ruling defendants then and there excepted.

Said witness Burch testified that he had discovered notices posted calling for a meeting of the Wardner miners' union at 7 o'clock in the morning; that a number of the miners employed by the Bunker Hill and Sullivan Company left and went to Wardner about that hour, where-

upon said witness was asked by the prosecution: "Just state what you did, Mr. Burch." To which question witness answered, in part: "Well, all right. In the afternoon or evening of that day, about half-past five —." Whereupon defendants objected to what the witness did as irrelevant and incompetent as against these defendants, and does not tend to prove any conspiracy on their part. The Court overruled said objection, to which ruling defendants then and there duly excepted.

That said witness Burch further testified that a number of men marched to the office of the Bunker Hill and Sullivan Company; that their leader, Mr. Ed. Boyle, who was president of the Wardner miners' union, mounted the steps of the boarding-house and said he would like to make an address to the night shift, who were standing there. Witness further testified: "I told him to go ahead and make his address. As near as I can remember, he said —." Whereupon defendants objected to the witness stating what Boyle said, upon the ground that it is hearsay and incompetent, as against these defendants, and objected to the proof of any conspiracy to which these defendants were not parties. The Court overruled said objection, to which ruling defendants then and there excepted.

That said witness Burch further testified that he made a speech to the employees of the Bunker Hill and Sullivan Company, and proceeded to state what he had said to them, whereupon defendants objected to what said witness stated to the men, as not showing any connection of the defendants with any conspiracy, which objection was

overruled by the Court, to which ruling the defendants then and there duly excepted.

That said witness Burch testified on cross-examination that he visited the "bull-pen" and had an interview with a man named Simpkins. That Simpkins was brought to the place where the conversation occurred by a colored soldier, whereupon the following occurred:

"Where did this soldier remain, if you know, while you were conversing with Mr. Simpkins?

"A. He paced back and forth. Oh, I should say thirty or forty feet away, something like that, in front of us.

"Q. Did you not cause the soldier to use his bayonet on that occasion?

"A. Why, no; I had nothing to do with the soldier.

"Q. Well, did he in your presence? A. No.

"Q. Did he point the bayonet at any time toward this Mr. Simpkins?

"A. It is probable that when Mr. Simpkins marched out in front of him there, that the soldier had his bayonet pointed toward him—I do not know—or pointed toward the ground, or carried it over his shoulder; I did not pay no attention to how the soldier walked.

"Q. Were there not two soldiers there?

"A. Two soldiers?

"Q. Yes? A. No, only one soldier.

"The COURT.—What has this to do with the case?

"Mr. REDDY.—It has this to do, if your Honor please, it shows the feeling of the witness.

"The COURT.—What the soldier does has nothing to do with the witness.

"Mr. REDDY.—If it was done in his presence and in an effort to extract testimony from the witness.

"The COURT.—All the stories about the soldiers using bayonets, etc., I do not want in here—I do not want in the case. I know what it is for. I do not intend that whole question up there shall be raked over in this case. I want to confine it to what is legal testimony. This has no tendency in the world to show the prejudice of this witness, even if the soldier pointed the bayonet at the party spoken of, and I do not intend, Mr. Reddy, to have the case encumbered with all the stories that have been circulated in that camp there. I know what they are there, and I have heard of them and want to keep them out of this case.

"Mr. REDDY.—If it be a fact I propose to show it.

"The COURT.—I will not listen to any more argument on that question.

"Mr. REDDY.—I want to state my case so that I will not stand before the jury in an endeavor to show what I have not a right to.

"The COURT.—You may. You may show that he used improper influences upon this man, Simpkins. You are connecting that with what this soldier is said to have done. Ask your questions and I will rule on them.

"Mr. REDDY.—Q. Now, Mr. Burch, is it not a fact that you sent for this witness to be brought to a certain room where this conversation was held?

"Mr. COZIER.—I object as incompetent, irrelevant and immaterial; not confined to anything in this case.

"A. No.

"The COURT.—Is Simpkins a witness here?

"Mr. COZIER.—He is not a witness here—not a defendant.

"The COURT.—The objection is sustained.

"Mr. REDDY.—We propose to show that one of our witnesses has been subjected to improper treatment, and an effort on his part to compel him to give testimony that would be beneficial to the prosecution. Now, this witness has been in the stand here on the part of the prosecution; now, have I not the right to show the feeling of this witness and his actions toward other witnesses in the case? Can it be possible that a man can come upon the stand here, who has attempted to influence witnesses, whether he be for the prosecution or the defense—

"The COURT.—Is Simpkins your witness?

"Mr. REDDY.—Simpkins is to be one of our witnesses; yes, sir. And we propose to show for the purpose of showing the feeling of this witness and his desire to convict, and his desire to injure these defendants, we propose to show that he—I will not say how, probably that would be improper just now—but that he has improperly and in a way to show that he not only had ill-feelings toward these defendants, but they proceeded in the most cruel and unheard-of manner to influence and coerce one of the witnesses who is now and will be a witness for the defense. Now, have I not a right to show—this witness, if he may be dismissed now, and we go on calling for him hereafter to show this, it seems to me that it will be dangerous for the defense.

"The COURT.—Under your statement I will allow you to ask this witness concerning any controversy or efforts

that he may have made to influence the witness Simpkins."

Said witness Burch then testified that he had been a witness and gave testimony on the trial of Paul Corcoran, whereupon he was asked by counsel for defendants:

"Q. Did you give the following testimony on that occasion:

"'Mr. BURCH.—Q. Did you say to him on that occasion, "Simpkins, we have enough evidence to hang you—you cannot get less than fifteen years; you have got a valuable invention—a patent you are liable to get big money out of, but how can you enjoy money when you are in the penitentiary"? A. No, sir; I did not?'

"A. I gave that testimony.

"'Q. Or did you say words to that effect?

"'A. Nothing to that effect.

"'Q. Did he not say, "I think the men that led the mob are out of the country"? A. I do not think so.

"'Q. Then did you not say, "You shall take the consequences then," and returned him to the soldier in charge?

"'A. I returned him to the soldier in charge; yes, sir.

"'Q. Now, for what reason did you go to the bull-pen to see Mr. Simpkins?

"'A. Because a mutual friend of ours had informed me that Mr. Simpkins was anxious to get out and asked me if I would help.

"'Q. You helped him by keeping him in?

"'A. I knew there was only one way to get out of there anyway—to tell the truth.

"'Q. You were the judge of the truth? A. No.

"'Q. And after you found that he insisted that he did not know anything you turned him back into the bull-pen?'

"'Then there is an objection. Did you give that testimony that far?

"A. Yes, I gave that testimony.

"Q. You turned him back to the bull-pen?

"A. They turned him back to answer my charge against him.

"Q. You are positive no such conversation as the conversation I have detailed to you occurred between yourself and Mr. Simpkins?

"A. Very much different from that.

"Q. Is it not a fact that you have required men seeking employment at the Bunker Hill and Sullivan to sign a statement that they were not members of the miners' union—prior to this trouble? A. It is not a fact.

"Q. I will ask you, Mr. Burch, if it is not a fact that your company is interested in this prosecution, in that they made a claim or notified the county that they would hold the county responsible for the destruction of the mill?

"Mr. COZIER.—I object to that.

"The COURT.—I will let counsel go on with the testimony in the Corcoran case.

"Q. I will ask you if you did not go to the bull-pen and have Mr. Simpkins brought out by four soldiers.

"A. No, sir.

"Q. I will ask you if Mr. Simpkins was not brougnt to you by four soldiers? A. No.

"Q. Any number of soldiers?

"A. Yes, one soldier.

"Q. How far was that soldier from you at the time that he delivered Mr. Simpkins up to you; about?

"Mr. COZIER.—I object to that; the Court passed on that."

The Court thereupon sustained said objection, to which ruling defendants then and there duly excepted.

That WALTER TAYLOR, a witness called for the prosecution, was asked upon direct examination: "I will ask you if you had any conversation with Mr. Ed. Boyle, president of the Wardner miners' union, on or about the 26th of April, relative to your going to work, or heard any statement made by Boyle in regard to you or men going to work in the Bunker Hill and Sullivan mine?" To which question defendants objected, upon the ground that it is incompetent and irrelevant, and does not relate to any conspiracy or act or doing on the part of the defendants. The Court thereupon overruled said objection, to which ruling defendants then and there duly excepted.

That I. T. Rouse, a witness called for the prosecution, testified as to a speech delivered by Mr. Boyle, and was thereupon asked by the prosecution: "State what he said, if anything, about the Western Federation of Miners." To which question defendants objected, upon the ground that it was leading and suggestive. The Court overruled said objection, to which ruling defendants then and there duly excepted.

That F. R. CULBERTSON, a witness for the prosecution, was asked upon direct examination: "I will ask you if you had any conversation with Mr. Corcoran on the morning of the 29th of April relative to where he was go-

ing that day, or where the members of the Burke union were going." To which question defendants objected, upon the ground that it is hearsay, and incompetent against the defendants to prove that they were members of any conspiracy, or the conspiracy charged in the indictment. The Court overruled said objection, to which ruling the defendants then and there duly excepted.

That Emil Anderson, a witness for the prosecution, testified that he was a member of the Mullan miners' union; that he did not work on April 29th, 1899; that on that morning he was told by some men there would be no work that day, and that there would be a meeting in the union hall; that he did not know who it was informed him, but that he attended the meeting at the hall. Thereupon defendants objected to the testimony of the witness, and to all testimony of like character, upon the ground it is incompetent, irrelevant, and immaterial, and does not tend to prove that defendants were in any way connected with the conspiracy alleged in the indictment, which objection was overruled by the Court, to which ruling defendants then and there excepted.

That FRED FUNK, a witness for the prosecution, was asked upon redirect examination: "Mr. Funk, did you give the same testimony before the coroner's jury that you gave here, practically?

"A. As far as the questions covered the same ground.

"Q. Substantially your testimony is the same?

"A. It is."

Whereupon defendants requested that the prosecution produce the testimony of said witness Funk taken at the

coroner's inquest, so that defendants might have an opportunity to impeach said witness, and requested the Court to make an order directing the prosecution so to do, which the Court declined to do. Whereupon defendants duly excepted to said ruling.

That A. M. ST. CLAIR was called as a witness for the prosecution, and upon cross-examination was asked by defendants' counsel:

"Q. Whereabouts did you reside, you say, last in Montana? A. In Hamilton.

"Q. Wasn't it in the penitentiary?

"A. I have been in the penitentiary, yes. There is where I met Mr. Malvey."

Whereupon defendants moved to strike out that part of the answer of the witness referring to Mr. Malvey, upon the ground that it is not responsive to the question, incompetent, irrelevant, and immaterial as against the defendant. The Court overruled said motion, to which ruling defendants then and there duly excepted.

That said witness St. Clair testified upon cross-examination that he had been sent to the penitentiary in Montana for striking a man over the head with a gun, whereupon the following offers and rulings were made:

"Mr. REDDY.—We offer the record in evidence to show he was sent there for larceny, and we offer—

"The COURT.—For what purpose?

"Mr. REDDY.—To contradict the witness, and to show that he was there for larceny, and not for striking a man over the head with a pistol.

"Mr. COZIER.—I object.

"The COURT.—As I understand, you have asked the witness whether he was in the penitentiary for a certain offense, or asked him what he was there for. He says he was there for having struck a man over the head with a revolver, or some weapon as he understands it. Now, you ask to introduce the record to show that he was there for another reason. I say it is an immaterial issue in this question upon what he may have been confined in the penitentiary, and as you examined upon that you are bound by his answers and you cannot contradict him, and I therefore sustain the objection to the introduction of the record that you offer."

To said ruling defendants then and there excepted.

That while said witness St. Clair was being cross-examined, the following motions were made by defendants and the following rulings made by the court:

"Mr. REDDY.—If your Honor please, I now offer to show that he has given his true name here, and that the record shows that he gave a different name from the one which he says is his true name now.

"Mr. COZIER.—I object to that for the same reason.

"The COURT.—The objection is sustained, and I add further—to make it plain—the issue here is not what his name is; the issue here is whether there was a conspiracy formed by these defendants and certain acts done in view of that conspiracy—that is the issue. What his name is, is not the issue, and therefore you are bound by his answer. Your motion is overruled.

To said ruling defendants then and there excepted.

That while said witness St. Clair was being cross-exam-

ined, the following motion was made by defendants and the following ruling by the court:

"Mr. REDDY.—I offer this record for the purpose of showing the witness on the stand was convicted in the State of Montana and sentenced to the state penitentiary of that State, for the crime of grand larceny, and to show that he has been living under a false name, and to show that the name which he now gives to this court is not his true name, and that the record establishes the contrary.

"Mr. COZIER.—Same objection.

"The COURT.—The chief objection to that, in my opinion, is that he was not convicted for perjury or anything of that kind, and the fact that he was there convicted of some other offense does not necessarily disqualify him as a witness, and I therefore sustain the objection to your offer. I suppose the record is for the purpose of impeaching his testimony?

"Mr. REDDY.—That is the purpose, and to show the character of the witness.

"The COURT.—I am aware that upon that there is a variety of opinions, but I think the prevailing rule is that a man's testimony can be impeached by a conviction, when that conviction was for perjury, and not for some other offense, and therefore upon that ground I sustain the objection to the offer. And I may say again that it is immaterial to put that record in, because the witness has already testified that he was in the penitentiary, and if that mere fact will weigh against his testimony, you will have the benefit of it already, without encumbering this record with another record, that cannot be material."

To said ruling defendants then and there excepted.

Thereupon the record referred to was offered for identification by the clerk, and said paper was marked by said clerk Defendants' Offered Exhibit "A," which record so offered was by the Court excluded. To the order of the Court excluding said record, counsel for the defendants duly excepted, and said exception was by the Court allowed.

That said witness St. Clair testified upon cross-examination that he had given testimony before the coroner's jury upon the inquest over the bodies of Cheyne and Smith, and that he had signed said testimony after it had been reduced to writing, whereupon he was asked the following question by defendants: "Did you deliver it to the coroner after you had signed it?" which question was objected to by the prosecution as immaterial and improper cross-examination, which objection was sustained by the Court, to which ruling defendants then and there duly excepted.

That said witness St. Clair was asked by the prosecution upon redirect examination: "You stated you were in the penitentiary; state to the jury whether you were pardoned out"—to which question defendants objected upon the ground that the pardon is in writing and is the best evidence, which objection was overruled by the court, to which ruling defendants then and there duly excepted.

That said witness St. Clair testified that he had been pardoned out of the penitentiary before the expiration of his term, which term was two years; whereupon defendants offered to introduce in evidence the sentence and judgment-roll in the case wherein witness was convicted,

for the purpose of showing the length of term, which offer was overruled by the Court, to which ruling defendants then and there duly excepted.

That G. A. OLMSTED was called as a witness for the prosecution, and testified that he was a conductor on the Northern Pacific Railroad, and that his train carried the United States mails; that his run was between Wallace and Burke; that his train was due in Wallace in the morning at 11 o'clock; that it was due in Gem, coming back to Wallace about 10:30 A. M., but that they had no time card, whereupon said witness was asked by the prosecution, "What time do you go by there?" to which question defendants objected upon the ground that it was incompetent, irrelevant, and immaterial, and that the only time involved is the schedule time fixed by the United States postoffice department. The Court overruled said objection, to which ruling defendants then and there duly excepted.

That said witness Olmsted testified upon direct examination: "A. Well, there was quite an excitement at Wardner. There was big gangs of masked men there, armed, and a great deal of excitement. Blowed up the mill." Whereupon defendants moved to strike out the answer of witness to the effect that they blew up the mill, which motion was denied by the Court, to which ruling defendants then and there duly excepted.

That said witness Olmsted testified upon cross-examination in answer to questions by defendants:

"Q. About what time did you reach Wallace, coming from Burke?

"A. Well, I should judge about 20 or 30—about 11:20 or 30.

"Q. Well, when did you register the time?

"A. Registered it at 11:45, I think the register shows."

Whereupon defendants moved to strike out the answer of the witness as to what the register showed as not responsive to the question, which motion was denied by the Court, to which ruling defendants then and there duly excepted.

That GEORGE K. MARSHALL, a witness for the prosecution, testified that he was a railway postal clerk; that his run was between Wallace and Tekoa; that on the 29th of April, 1899, the delay of his train at the terminal, which was Wallace, was 25 minutes; whereupon, in answer to question by counsel for defendants, witness testified that he kept a register, which register is required to be kept by the rules and regulations of the postal department, in which he noted the arrival and departure of the mails. Whereupon defendants objected to the testimony of said witness as to the delay at the terminal upon the ground that the register is the best evidence; that it is required to be kept by the rules of the department, and therefore oral evidence is not admissible in the absence of the failure to account for the register. The Court overruled said objection, to which ruling defendants then and there duly excepted.

That said witness Marshall testified that the mail was delayed at Wardner, on the return trip from Wallace, about an hour and ten minutes; that he could not tell exactly; whereupon defendants objected to any further

questioning of the witness concerning the arrival of the train at Wardner, on the ground that the law requires a register of the time of arrival and departure of the mails to be kept by the witness, and that register is the best evidence of the time; that there is no attempt to account for the register, to show its loss or destruction, and that therefore the evidence is inadmissible. The Court overruled said objection, to which ruling defendants then and there excepted.

That GEORGE A. SMITH, a witness for the prosecution, testified on direct examination:

"On the 28th the report was the men had gone to work in the Last Chance, and I supposed, naturally, the strike was over. On the morning of the 29th—I stayed at the mill boardinghouse that night—the morning of the 29th, why—"

"Mr. REDDY.—We object, if your Honor please, to any testimony as to the events at the Bunker Hill and Sullivan mill. * * *

"Mr. COZIER.—It is not my purpose to show the destruction of this mill. I simply want to show the concerted movements of these men on that day.

"Mr. REDDY.—We object to this—movements of those men at that place, in the line of examining about the mill, and its destruction.

"Mr. COZIER.—I submit, we allege a conspiracy on the part of those men, to do a certain act. We can only prove that conspiracy by showing what they did, in carrying it out.

"The COURT.—If you can show the action of the men at Wardner, and connect that with the action of the men

up the creek—the other places—and then connect that with the interference with the trains, it is within the line of your testimony. * * * With that object in view I overrule the objection."

To which ruling defendants then and there duly excepted.

That said witness Smith proceeded to detail his movements on the 29th of April, 1899, and testified as to what came under his observation, and was asked by the prosecution, "Go on and state what you did," to which question the witness said: "Well, I left the boardinghouse * * * and went up to see what was going on—see what the trouble was." Whereupon defendants objected to said question and moved to strike said answer out upon the ground that it is immaterial, which objection and motion were overruled by the Court, to which ruling defendants then and there duly excepted.

That Mrs. TONY TUBBS, a witness for the prosecution, testified that she was in Wardner on the 26th of April, and was asked by the prosecution: "What came under your observation then in regard to the troubles between the Union and the Bunker Hill and Sullivan Mine?" to which question defendants objected upon the ground that the proceedings of April 26th have no bearing upon the matters charged here as crimes. The Court overruled said objection, to which ruling defendants then and there duly excepted.

That during the cross-examination of L. W. Hutton, a witness for the prosecution, said witness was asked: "Q. Was there anything on any of the cars in the way of a

notice or mark to show that their cars were carrying United States mail?" which question was objected to by the prosecution upon the ground that it is incompetent, irrelevant, and immaterial, which objection was sustained by the Court, to which ruling defendants then and there excepted.

That J. H. MARTIN, a witness for the prosecution, testified that Arthur Wallace, one of the defendants, came to a place called the Sunset mine a few days after April 29th, and there related to witness the occurrences of April 29th, 1899, and was thereupon asked by the prosecution:

"Q. Well, just go on and state what else he said in the whole conversation as to his movements that day.

"A. He said, when they got down to Wardner, they detailed about seventy-five men—throwed them out on to the left-hand side, along a ridge—high piece of ground. Said there was a lot of men went to the mill, placed the dynamite in place—

"Mr. REDDY.—We object to that, if your Honor please, as irrelevant and immaterial.

"Mr. COZIER.—We submit that it is a part of this conversation.

"The COURT.—Well, it is only applicable to this defendant. He is relating the conversation—I think the conversation may go in. I will overrule the objection."

The defendants then and there duly excepted to said ruling.

That THOMAS WRIGHT, a witness for the prosecution, testified that he was a hardware clerk residing at

Wardner; that on the 29th of April, 1899, the defendant C. R. Burris came into the store where witness worked, and wanted to buy a box of rifle cartridges, whereupon witness was asked by the prosecution:

"Q. Did you sell them to him? A. No, sir.

"Q. Why not?"

To which question the defendants objected on the ground that it is irrelevant and immaterial as to what his reasons were for not selling them. The Court overruled said objection, to which ruling defendants then and there duly excepted.

At the close of the testimony of the witness Thomas Wright, counsel for the prosecution, stated that he had no further witnesses whom he could put upon the witness stand at that time, and requested the Court to adjourn until the following day, or that the defendants proceed with their case.

Thereupon defendants declined to proceed with their testimony until the prosecution had closed its case.

Thereupon, at the suggestion of the Court, counsel for the prosecution stated that he desired to call three witnesses for the Government, which witnesses would not arrive until the following day, and further stated what he expected to prove by said witnesses.

The Court then ordered the defendants to proceed with their defense, before the prosecution had closed its case, to which ruling the defendants then and there excepted.

That the following motion was made by defendants:

"Mr. REDDY.—I would like to make a motion, if your Honor please, before proceeding to the statement. It

will take but a moment. We offer the record of the conviction of A. M. St. Clair, the witness who was upon the stand here—the record is marked Exhibit "A," and marked for identification October 30, 1899—for the purpose of proving his conviction of the crime therein stated —I mean stated in the exhibit.

"The COURT.—Well, that is the same offer you made before, is it not?

"Mr. REDDY.—Not the same offer. It was offered specially before; at least, I thought your Honor understood it that way. I thought it was offered for all purposes for which it is admissible, but, for fear that I may have been misunderstood at that time, I now make the general offer, for the purpose of proving his conviction of a felony, and the crime—when it was committed, and all that the record shows."

The Court overruled said offer, and refused to admit said document in evidence, to which ruling the defendants then and there duly excepted.

That the following motion was made by the defendants:

"Mr. REDDY.—The next is, we move to strike out all of the testimony of the following named witnesses, upon the ground that we have not had an opportunity to cross-examine those witnesses, or to use the evidence taken at the coroner's inquest, for the purpose of aiding us in the cross-examination or for the purpose of impeaching or contradicting those witnesses. The names of the witnesses are: A. Burch, Fred Funk, A. M. St. Clair, William McMurtrie, A. S. Crawford, Sophia Moffitt, M. J. Sinclair, William Doherty, and James H. Martin, and for

the further reason that we have not been able to obtain, and it has been withheld by the prosecution, the shorthand notes taken by Mr. Rivers, as shorthand reporter, of the testimony taken at the inquest held by France, coroner of Shoshone county, on the body of James Cheyne and on the body of John Smith, so as to enable the defendants to cross-examine those witnesses, as to their former testimony, and to show that their testimony here is contradictory of their testimony on that occasion, and that they have not been permitted to impeach them by that testimony, and that the defendants have been denied access to either the transcript now on file, and a record of the county of Shoshone, Idaho, and that they have not had access to the shorthand notes taken by Mr. Rivers, so as to enable him, from his notes, to testify as to the evidence given on that occasion, and on the general grounds that they have not been permitted an opportunity to fully cross-examine those witnesses.

"The COURT.—The latter motion is overruled, and I may add upon the further ground, that if the notes were here, they would not be admissible; they would be simply in the nature of hearsay evidence.

"Mr. REDDY.—I do not wish to be understood—let me explain that—I did not want the notes for the purpose of offering them in evidence, but simply to enable the shorthand reporter to prove what transpired—what was said by those various witnesses on the occasions named. That is the purpose. Of course, the notes would not be admissible in evidence as your Honor states.

"Mr. COZIER.—I will state, your Honor, there is one statement counsel made in his motion; that is, that those

notes were in the hands of the prosecution. Now the record will show that is not the case. As a matter of fact, that was not the case. The notes have never been in the hands of the prosecution of this case.

"Mr. REDDY.—If I said in the hands of the prosecution, I should have said under the control.

"Mr. COZIER.—There is nothing in the record to show they are under the control of the prosecution.

"Mr. REDDY.—Then, if your Honor please, I stand upon the ground that the prosecution opposed the motion for subpoena duces tecum to bring those papers into court, and consequently, of course, must be chargeable with defeating our object, in attempting to get it. That is the reason why I say, in the control of the prosecution.

"The COURT.—Well, I have stated before I think, in my reason for overruling a like motion, that all of those papers and documents, which counsel has requested, are such as have been taken under the authority of the State, and the United States Government has had nothing whatever to do with the taking of any of that testimony.

"Mr. REDDY.—Shall I understand your Honor to say that these shorthand notes were taken under the authority of the State?

"The COURT.—Certainly not under the authority of the United States. The Government never authorized anything—had nothing whatever to do with it whatever—so in no sense are any of those notes or any of that testimony under the control of the Government or its officers, so the motion will stand overruled for the reasons stated heretofore."

The defendants then and there duly excepted to said ruling.

That J. H. FORNEY was called and examined as a witness for the defendants, and during his direct examination testified that he had appeared and opposed the effort of the defendants to obtain the testimony taken before the coroner at the inquest on the bodies of Cheyne and Smith, upon the ground that the publication of that testimony would expose the entire line of the prosecution in behalf of the State, whereupon the witness was asked:

"Q. Well, is it not a fact that when you made that statement counsel for the defendants assured you that they would not ask for any testimony concerning any one absent, and would protect you fully on that line, but we wanted it so far as the witnesses against these defendants are concerned? * * *

"Mr. COZIER.—I submit he is presenting this to the jury. I cannot see where it is a question of fact. If he is going to bring in a question of law, that is a matter that is before the Court. I cannot see what the jury has to do with this testimony.

"The COURT.—I will say, the jury has nothing to do with this at all. It is a question of law. The only question is as to the right for the testimony. I certainly shall not change the ruling I made on that.

"Mr. REDDY.—I submit so your Honor can have a full view of what we are driving at. I take it to be the law that whenever a party to a prosecution, or the prosecutor, or anyone connected with the prosecution, deliberately and willfully withholds evidence which may operate as a shield for witnesses brought against the defendants, and

which would protect them from contradiction or impeachment, * * * I want to show that this prosecution is not acting in good faith, but on the contrary is withholding evidence which they have in their possession and under its control. * * * That this prosecution has deliberately withheld evidence which has been taken and written out, which will, as we claim, expose these witnesses and show that they were false and impeach them.

"The COURT.—We will not have any more of this before the jury. I see what the object is. It was clearly shown before here, that this testimony was in the hands of the State, and that this Court, as I have before clearly expressed myself, would have had to come in conflict with the authorities of the State to get that testimony, and it is not necessary now to place anything more in the record. You have got your objection to that just as fully as you can have it now, and I shall decline to make any order concerning that testimony. I shall sustain objections now to any further evidence or testimony upon that subject, because that whole matter has before already been gone over.

"Mr. REDDY.—Not before the jury.

"The COURT.—The jury has not anything to do with it. It is not to go before the jury. I sustain the objection to it."

To which ruling of the Court the defendants then and there duly excepted.

That counsel for the defendants made the following statement:

"Mr. REDDY.—On another line; by Mr. Forney I wish to show that after this testimony had been taken and transcribed and filed, as already described, that Mr. Forney, as leading counsel and director of the prosecution there, requested Mr. Rivers, who was the stenographer who took and translated this testimony, to deliver up his notes to Mr. Forney, and the other counsel, and that they were put in the possession of Mr. Folsom, and that we have served a subpoena duces tecum upon Mr. Forney and Mr. Folsom, requesting that they produce the shorthand notes, in order to enable the stenographer here to translate them here and give us the evidence that was taken there, in so far as it relates to these defendants, or any of them—no further. * * * And we wish to present to this jury to show them that the prosecution has withheld these notes from us, and I desire to say in this connection the same as in the other, that Mr. Forney appeared here and opposed our obtaining possession of those notes, for the purposes as stated, and that Mr. Cozier, the United States district attorney, joined him in opposition to our having those notes.

"Mr. COZIER.—I object to it on the general ground that it would be incompetent, irrelevant, and immaterial —nothing to do with the prosecution of this case, or any fact connected with this case.

"The COURT.—I make the same ruling, and for the reasons substantially stated before, and the additional reason that, if the notes were here, they could not be offered as testimony."

To which ruling defendants then and there duly excepted.

That JAMES B. PIPES, a witness for the prosecution, was recalled, and testified in rebuttal that on April 29, 1899, he was made a prisoner by a number of armed and masked men; that when the Bunker Hill and Sullivan Mill was blown up a number of men about him shouted "Go it, America." "To hell with America." "Down with America," and other expressions, and further testified on cross-examination: "I made up my mind that the mill was going to be blown up, and took it as a matter of fact, but when I heard men stand by and make such expressions as that, I did begin to get excited, and I says, why if anything is going to happen to us, we might just as well keep cool, as to be excited. Really, we did not dare appear to be excited that day." Thereupon the witness was asked: "You remember that very distinctly—those expressions, and you expect now that the jury will be excited, do you not?" to which question the prosecution objected on the ground it is incompetent and immaterial, which objection was sustained by the Court, to which ruling the defendants then and there duly excepted.

The foregoing is substantially all of the evidence adduced at the trial of said case.

Be it further remembered that at the close of the testimony on the part of the prosecution and defense, and before the argument, the prosecution, with the permission of the Court, dismissed the second and third counts in the indictment filed in this action.

That at the proper time the defendants requested the Court to give the jury the following instructions: "The defendants are being tried for the offense of conspiring to commit the crime. The offense, you perceive, consists

in two or more persons conspiring to commit the crime described in the first count, namely: To obstruct and retard the passage of the United States mails. Merely agreeing, combining, and confederating together to effect the object of the conspiracy is sufficient to constitute the offense if any one of the parties took a step toward its execution.

The act set forth in the indictment, to wit, obstructing and retarding the passage of the United States mail, is no part of the offense charged. The purpose of the law is, that a mere crime, however corrupt, shall not be punished as a crime unless it has led to some overt act."

The Court thereupon refused to give said instruction, and the defendants then and there duly excepted to said ruling.

That at the proper time defendants duly requested the Court to give to the jury the following instruction:

"If the defendants, or any of them, belonged to such organization or association for lawful purposes, and that some of the members as individuals or combined with others, independent of the organization, to willfully and maliciously carry out the unlawful purpose as set forth in the indictment, but that such organization as a whole, or these defendants as individuals, did not join or participate in such combination, then such defendant or defendants cannot be held responsible for the acts of such combination or of such individuals."

The said Court thereupon refused to give said instruction, and defendants then and there excepted to said ruling.

That at the proper time defendants requested the Court to give to the jury the following instruction: "If you find

that the defendants, or any of them, did not combine to obstruct or retard the passage of the United States mail, as set forth in said first county, then such defendants should be acquitted."

The said Court thereupon refused to give said instruction, and defendants then and there excepted to said ruling.

That at the proper time defendants requested the Court to give to the jury the following instructions: "The offense charged in said first count, to wit, obstruct and retard the passage of the mail as therein set forth, is an offense exclusively against the United States and cognizable only in the federal courts. It is not an offense against the State of Idaho. The stopping of railroad trains and railroad cars is an offense against the State of Idaho, and not an offense against the United States."

The said Court thereupon refused to give said instruction, and defendants then and there excepted to said ruling.

That at the proper time defendants requested the Court to give to the jury the following instruction: "The evil intent in committing the offense against the State of Idaho is not sufficient to constitute the offense charged in this indictment. To constitute the offense set forth in said indictment, the specific intent to violate the laws of the United States and to commit the crime of willfully and knowingly obstructing and retarding the United States mails, as set forth in said count, must be found to have existed in the minds of the defendants in order to justify a conviction."

The said Court thereupon refused to give said instruction, and defendants then and there excepted to said ruling.

That at the proper time defendants requested the Court to give to the jury the following instruction: "The meaning of the words 'knowingly' and 'willfully' is defined as follows: Doing or omitting to do a thing knowingly or willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it, and to constitute the crime set forth in said first count, it must be proved beyond a reasonable doubt that the act of obstructing or retarding the passage of the mail was done knowingly and willfully by the defendants; that is to say, that they intended to do it."

The said Court thereupon refused to give said instruction, and defendants then and there excepted to said ruling.

That at the proper time defendants requested the Court to give to the jury the following instruction: "If you find from the evidence that a conspiracy was formed by a number of persons for the purpose and with the intent to commit a crime against the State of Idaho, and that incidentally the United States mail was obstructed or retarded by said conspirators, but without any knowledge and without any intention on the part of said conspirators to obstruct or retard the mail, such acts would not constitute an offense against the United States."

The said Court thereupon refused to give said instruction, and defendants then and there excepted to said ruling.

That at the proper time defendants requested the Court to give to the jury the following instruction: "In order to make one an aider and abettor of conspirators, it is necessary that he should do or say something showing his consent to the felonious purpose and contributing to its execution."

The said Court thereupon refused to give said instruction, and defendants then and there excepted to said ruling.

That at the proper time defendants requested the Court to give to the jury the following instruction: "You are instructed that it makes no difference in this case whether the United States mails were obstructed or retarded. The offense in this case consists in the unlawful agreement or conspiracy to obstruct and retard. If there was no agreement or conspiracy to obstruct, then the defendants are not guilty of the crime charged and you should acquit them. Obstructing and retarding the passage of the United States mail is a distinct and independent offense from that of conspiring to obstruct and retard."

The said Court thereupon refused to give said instruction, and defendants then and there excepted to said ruling.

The foregoing instructions requested by the defendants were not given to the jury by the Court, nor was any instruction given by the Court which embodied the substance thereof.

Be it further remembered, that thereafter and on the 5th day of November, 1899, the jury returned the following verdict:

In the District Court of the United States, for the District of Idaho.

THE UNITED STATES
vs.
LOUIS SALLA and Others.

Verdict.

We, the jury in the above-entitled cause, find the defendant Fred. W. Garrett, not guilty; and we find the defendant Dennis O'Rourke, guilty; and we find the defendant C. R. Burris, guilty; and we find the defendant Edward Albinola, guilty; and we find the defendant Louis Salla, guilty; and we find the defendant Henry Maroni, guilty; and we find the defendant W. V. Bundren, not guilty; and we find the defendant, Fred E. Shaw, not guilty; and we find the defendant John Luchinetti, guilty; and we find the defendant Arthur Wallace, guilty; and we find the defendant P. F. O'Donnell, guilty; and we find the defendant Mike Malvey, guilty; and we find the defendant Francis Butler, guilty, as charged in the indictment.

ELIAS TUCKEY,
Foreman.

Thereupon the defendants convicted duly excepted to said verdict.

Thereafter, and at the proper time, defendants filed and presented to the Court the following motion:

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs.

vs.

LOUIS SALLA, FRANK BARON, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. G. AUSTIN, THOMAS MURRAY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURKE, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENIS LARRY, PAT. CORARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Motion for Arrest of Judgment.

Now come the defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Mike Malvey, H. Maroni, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, and C. R. Burris, for themselves, and each of them, move this Honorable Court that no judgment be rendered on

the verdict against the defendants herein upon the ground:

First.—That the first count of said indictment charges the defendants, with others, with the commission of a felony, to wit, a conspiracy to obstruct and retard the passage of the United States mail in violation of section 5440 of the Revised Statutes of the United States; and that the second count charges the defendants, with others, with the commission of a misdemeanor, to wit, willfully and knowingly obstructing and retarding the passage of the mails of the United States in violation of section 3995 of the Revised Statutes of the United States.

That the third count also charges the defendants, with others, with the commission of a misdemeanor, to wit, willfully and knowingly obstructing and retarding the passage of the mails of the United States in violation of section 3995 of the Revised Statutes of the United States.

Second.—That the first count charges the defendants with the commission of a felony, and the second count charges the defendants with the commission of a misdemeanor, and the third count charges defendants with the commission of a misdemeanor, and, therefore, a count for felony and one for misdemeanor are joined in the indictment.

That the said several counts are not for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transac-

tions of the same class of crimes or offenses which may be properly joined.

Third.—That the indictment does not show that the count refer to the same act or transaction, or to two or more acts or transactions connected together or to two or more acts or transactions of the same class of crimes or offenses which may be properly jointed.

Fourth.—That the offenses alleged in the first count and the offenses alleged in the other two counts contained in the indictment are separate and distinct offenses, and in nowise related to each other; different penalties are prescribed by law, and the challenges to the jurors on the first count are different from those allowed on the second count and the third count, and a different procedure is required in the trial of the causes.

Fifth.—On the ground that the facts stated in said first count do not constitute a public offense.

That said count is insufficient in this: that it does not appear upon the face of said count in said indictment that the said Northern Pacific Railway Company was authorized by law or by the United States to carry the mail of the United States in said car or over the lines or tracks described in said *court* on the 29th day of April, 1899, or at any other time, or that said Northern Pacific Railway Company was ever authorized by law, or by the United States, or otherwise, to carry said United States mails over said lines or tracks, or elsewhere. or that said

United States mail was ever delivered to said Northern Pacific Railway Company for carriage from one place to another or from any one postoffice to another.

Sixth.—That the facts stated in the said second count do not constitute a public offense.

That said count is insufficient in this: that it does not appear upon the face of said count in said indictment that the Northern Pacific Railway Company was authorized by law, or by the United States, to carry the mail of the United States in said car or over the lines or tracks described in said count on the 29th day of April, 1899, or at any other time, or that said Northern Pacific Railway Company was ever authorized by law, or by the United States, or otherwise, to carry the said United States mails over said lines or tracks, or elsewhere, or that said United States mail was ever delivered to said Northern Pacific Railway Company for carriage from one place to another or from any one postoffice to another.

Seventh.—That the facts stated in said third count do not constitute a public offense.

That said count is insufficient in this: that it does not appear upon the face of said count in said indictment that the said Oregon Railway and Navigation Company was authorized by law or by the United States to carry the mail of the United States in said car or over the lines or tracks described in said count, on the 29th day of April, 1899, or at any other time, or that said Oregon Railway

and Navigation Company was ever authorized by law, or by the United States, or otherwise, to carry said United States mails over said lines or tracks, or elsewhere, or that said United States mail was ever delivered to said Oregon Railway and Navigation Company for carriage from any one place to another or from any one postoffice to another.

PATRICK REDDY,
CLAY McNAMEE,
PETER BREEN,

Attorneys for Defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Mike Malvey, H. Maroni, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, and C. R. Burris.

The Court thereupon denied said motion, to which ruling defendants then and there duly excepted.

Thereafter the defendants were duly arraigned for sentence, and in response thereto filed and presented to the Court the following motion for a new trial:

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARON, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCHINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. G. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRAY, H. MARONI, CHARLEY GARRETT, P. F. O'DONELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURKE, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, KARCUS DALY, MIKE WELLS, DENNIS LARY, PAT. CORARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Motion for New Trial.

Now come the defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Mike Malvey, H. Maroni, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, and C. R. Burris, for themselves, and each of them, move this Honorable Court for a new trial in this action on the following grounds, to wit:

1. That the jury was guilty of misconduct, by which a fair and due consideration of the case was prevented.

2. That the Court misdirected the jury on matters of law.

3. That the Court has erred in the decision of questions of law arising during the course of the trial.

4. That the verdict is contrary to law and the evidence in the case.

PATRICK REDDY,
CLAY McNAMEE,
PETER BREEN,

Attorneys for Defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Mike Malvey, H. Maroni, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, and C. R. Burris.

In the District Court of the United States, within and for the District of Idaho.

October Term, A. D. 1899.

THE UNITED STATES OF AMERICA,
Plaintiffs,

Against

LOUIS SALLA et al.,
Defendants.

Instructions Given by the Court.

Charge to the Jury (Orally Given).

Gentlemen of the Jury:—I heartily congratulate you that this case is nearing its conclusion—at any rate, the mantle of responsibility that has rested upon the Court and its officers is about to fall upon your shoulders, and it will devolve upon you to say when this case shall be determined, after the instructions which I give you. The Court has endeavored, during the trial of this cause, to keep out of it matters that are not pertinent to it. It is nearly always the case, however, in a lengthy trial that there will be some matters slip in that should properly be left out, and I desire to draw your attention simply to that which belongs in the case, and try to exclude from your minds everything which does not belong, and certainly you will allow nothing whatever which is outside of the record to influence you in any way.

The Government has been referred to here—the general Government—as a mighty government, a strong government prosecuting these weak men. Well, of course, gentlemen of the jury, I am proud, and you are proud, that our Government is strong; it is something we may be proud of, but, at the same time, while we rejoice in the strength of our Government, we must all understand that the Government does not seek injustice, or the punishment of any of its citizens unjustly. When you stop to think of it—what is the Government? It is often spoken of as though it was some foreign power, some power inimical to our interests. Why, gentlemen, the Government of the United States is nothing more than the people of the United States—you, yourselves, constitute a part of that Government. You are, to be sure, here acting under the direction of the Government, as its ministers, as its officers, to enforce its laws. Its laws, I say—the laws that you, yourselves, help to make, and you, yourselves, are responsible for. We are all, as citizens of this Government, responsible for the laws that exist, and I confess I get somewhat impatient when I find reference made to the Government, as if it were an institution or an organization inimical to the interests of the people at large. It is not; it is nothing more than the people themselves. Now, then, disabuse your minds of all references of the kind that may tend to prejudice you, or may tend to make you feel that there is some great power here trying to persecute some innocent person. That is not the case, in any case the Government ever institutes. I regret, too, that reference has been made to our State Government. We

have nothing whatever to do with that in this case. The State Government, undoubtedly, is doing what it can to suppress wrong and to follow the law, and it should not be criticised in this prosecution or in this case. And the governor of the State, I regret, has been referred to in a way that should not have been. I, for one, am ready to uphold the commands of the governor, or any other officer who was honestly trying to perform his duty and enforce the law properly.

Now, I want to withdraw from your minds all these references that have been made that do not pertain or belong to the case. All these references that have been made to what is termed "improper treatment of these parties in the Coeur d'Alene country"; that is an issue that is not here, and if it were, why, then, we would be entitled to testimony upon both sides to determine whether wrong had been inflicted or not, or whether or not great injustice had been done anyone, or great punishment had been inflicted upon anyone. Those matters are not here before you at all, so that I ask you now to disabuse your minds of any references that have been made in this case of any matters that do not belong to the issue. And I am satisfied, gentlemen, from the earnest attention which I am happy to say you have given this case all the way through—long as it has been—that you are impressed with the idea and the feeling that you are here as jurors, and that you are to do justice between the people of this Government and these defendants at the bar. There are, before I come to the main and important questions in this case, a few preliminary instructions which I

desire to give you in view of the testimony; and the first is, as to the credibility of witnesses.

You are the sole judges of the credibility of witnesses; that is, you are to determine as to the truth of the testimony given in the case, and while it is the right of the Court to express its views of the testimony, it is still your duty and province, notwithstanding any views that the Court may entertain or express, to reach your conclusions by the exercise of your own judgment, after a careful examination of all the testimony. Your object and your duty is to learn the truth, through the testimony of the witnesses, and to do this you must endeavor, especially since the testimony is conflicting in this case, to discriminate between the true and the false—to separate the wheat from the chaff. You are not bound to believe as truthful the testimony of any witness, when you are satisfied or convinced that it is false. As aids in judging of the veracity of a witness you may take into consideration his manner, his bearing upon the stand, his interest in the result of the case, whether he entertains enmity against the parties, or has a personal interest or desire for their acquittal, and in this connection you will consider the relationship witnesses may bear to the defendants, either the relations of kinship, or as members of the same organization or society, or any other fact concerning their situation that would tend, in your opinion, to influence their testimony, and generally, whether under all the circumstances of the case the testimony of a witness is reasonable or probable—whether it is corroborated by other

facts or circumstances in the case that are clearly shown to exist.

Generally, testimony may be weighed somewhat by the number of witnesses upon opposite sides of the same question, but this is far from an invariable rule. In other words, you are not bound to take the testimony of a majority or a greater number of witnesses when you believe it is not truthful, and you may, when convinced of the truth of a minority of witnesses, take their statements as true. In all cases you are to take as truthful testimony of the witnesses whom you are convinced have testified truthfully, and to discard that which you believe is not true, and, as before said, you must be the judges of that which is true and that which is false. Of course this does not mean that you may arbitrarily say that the testimony of one witness is true, and that of another is false, but you must be governed, in reaching such a decision, by the circumstances and evidence of truth, to which I have already referred.

As another proposition of law, I instruct you that it is the law in criminal cases, that before an accused party can be found guilty of a charge against him, you must be satisfied of his guilt beyond a reasonable doubt. This, however, does not mean that you must be convinced to a degree of absolute certainty or to such a degree as will exclude all doubt. As a rule, crimes are not committed generally in the searching light of day, but more frequently under the cover of darkness, and without the range of human observation, so it often follows that they must be shown by what is termed "circumstantial evidence."

What, then, is the meaning of the term "reasonable doubt"? I may add, that it is difficult to give such an exact definition of the term as that jurors will clearly comprehend it, but it is such a doubt that will naturally and without effort rise in your minds from the unsatisfactory nature of the testimony. It is such a doubt or such a state of mind as would cause a prudent man to consider—to inquire, before being willing to act in some important matter in which he is personally and much interested. It is not, however, a mere arbitrary doubt or a mere vagary or fancy wrought up in the mind, through some imaginary state of facts; it is not a question of what may or might have been, but of what is or was. You are not to go outside of the testimony, and, by indulging your imagination that this or that may have occurred, apply some theory which is not supported by the actual evidence given in the case.

Reasonable doubt is such as must grow out of the evidence only, but from the imagination, never. While your oath, as jurors, imposes upon you weighty obligations, it does not demand of you that you entertain any doubt which you would not, if not under oath. In other words, it is not required of you to doubt, as jurors, when, as men, you would believe. Consider, therefore, the testimony, and let it have its natural effect and weight upon your minds, unswerved by any bias, sympathy, or prejudice, and follow the conclusion which your best judgment dictates from the testimony. If that persuades you of the defendants' guilt, beyond such reasonable doubt as I have attempted to define, you should so find, but if you should still entertain such doubt, you should acquit.

In this connection I give you, at the request of defendants' counsel, their No. 2, upon the question of the burden of proof.

"The burden of proof is upon the prosecution in this case to prove beyond a reasonable doubt:

"First.—That a conspiracy, or, in other words, an agreement, was entered into between two or more of the defendants to commit an offense against the United States; that is to say, to willfully and knowingly obstruct and retard the passage of the United States mail, as alleged in said first count.

"Second.—In addition, it must be proved beyond a reasonable doubt that one or more of said defendants committed some act to effect the object of the conspiracy.

"Third.—The prosecution must prove beyond a reasonable doubt that the defendants, or two or more of them, did agree, combine, and conspire to willfully and knowingly obstruct and retard the United States mail, as alleged in said first count. The alleged conspiracy may be proved by circumstantial evidence, if it be considered enough to convince the minds of the jury beyond all reasonable doubt that such conspiracy was formed. The burden of proof is upon the prosecution to prove, beyond a reasonable doubt, that the defendants were parties to said conspiracy."

And now, gentlemen, with these preliminary suggestions of the law, I come to the most important part of this case, and to which I ask your very careful attention. You have noticed that this indictment had in it, originally,

three counts, the first of which charged a conspiracy to obstruct the mails of the United States. The other two charged an obstruction of the mails of the United States. Numbers two and three are dismissed by the motion of the prosecuting attorney, and, by the way, something has been said about that. I say to you, now, that he had a perfect right to dismiss those counts, and there is no reason why you should disbelieve the statement he made or reason he gave for dismissing them, but, in addition to that, I state to you that the dismissal cannot be construed as an admission, in any way, that the counts could not be proven. You will therefore consider only the first count of this indictment, just as if there never had been the other two counts in the indictment. The first count, or the only count in the indictment, is based upon two sections of the Statutes of the United States; the first being 5440, which is substantially in these words: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, in any manner, and if one or more of such parties do any act to effect the object of the conspiracy, all the parties to the conspiracy shall be liable to a penalty, etc. With that you have nothing to do—the penalty. The other section is 3995, which is: "Any person who shall knowingly and willfully obstruct and retard the passage of the mail, or any carriage, horse, and driver, or carrier carrying the same, shall for every such offense be punished, etc." In this indictment, under these two sections of the statute, there are involved these propositions: That a conspiracy was formed to commit an offense against the United States, and which, in

this case, is alleged was to obstruct and retard the passage of the United States mail. Now, that is an important part of this case; a conspiracy was formed to obstruct the passage of the United States mail. A second proposition is: That these defendants were members of such conspiracy. And the third is: That one or more persons belonging to such conspiracy did some act to carry out the conspiracy. The Supreme Court of the United States, which of course is our guide, has in general terms defined a conspiracy to be a combination of two or more persons to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means. You will see involved in that, two ideas: First, it is a combination of two or more persons to commit some unlawful act, and that is to be applied to this case. Now, your first duty will be to determine whether such a conspiracy was formed, as is contemplated by the statute, and it will be natural for you to ask what evidence must you have to show you that a conspiracy did exist. The statute includes any combination, association, or co-operation together of two or more persons, for the purpose of committing some offense against the United States. Conspiracies being criminal, their organization, constitutions, plans, and agreements are not made public, but great care is observed to keep them secret. It would be unreasonable, therefore, to demand that such facts must be established by direct proof, but they may be shown by circumstantial evidence, just as most other crimes may be. It is not necessary to show that the parties to a conspiracy actually met together, and in a formal

manner agreed to enter into it. The essence of a conspiracy is the combination, the banding, agreeing, or working together, the common design, the concert of action by the parties, and any evidence which tends to show such facts is proper for your consideration. It may be shown by the different acts by different persons at different times and places, and when such acts, considered together, if unexplained, lead to the conclusion that they are all parts of one scheme, and, together, lead to the accomplishment of some unlawful object, they establish the conspiracy, and they are actors, as members of it. We cannot penetrate the minds of the conspirators to discover their real intentions or designs, but these, as in other criminal actions, may be reached through their actions, for men are presumed to intend what they actually do, and they will be held for what they do, unless their acts are explained and shown to be innocent of wrong intent.

I will invite your attention, briefly, to some of the facts which you must consider in determining whether or not this conspiracy or combination existed. It is beyond dispute that there was a conflict between the men who belonged to the different miners' unions in the Coeur d'Alenes and the Bunker Hill and Sullivan Mining Company. Which party was right in that is immaterial to you; you have nothing to do with that. I simply refer to the fact that there was a conflict of some kind between them, and that on this particular occasion there was an attempt made to enforce the rights which these men, belonging to these different associations, claimed. On the

29th of April it appears that a large body of men reached the Kellogg station. You must take into consideration the manner in which they arrived there to determine whether there was any concert of action among them, or not. Your attention has already been called by counsel, as well as by the testimony of witnesses, as to how those parties gathered together. You will remember that on that particular day the mines in the upper part of the country, up the canyon, all ceased work, and, by the way, it may be noted here that those mines were generally worked by men belonging to the miners' union. Now, there is evidence of concert of action there, in the fact that they all ceased working on that day; that they came down from the different mines and from the different camps, as it would appear, by concert—at all events, they all arrived at about one time, and took possession of this railway train, and at the same time loaded on to it a large amount of powder. While these operations were going on there another crowd of men, who, it appears, belong also to the miners' union—at least largely so—at Wardner, had left the town of Wardner and gone up the railroad track, evidently to meet this incoming train. And, in that connection, you will bear in mind that this train was not due at that particular time—there was no regular train due that hour in the day and the train was there out of time, as I recollect the testimony. Now, you will consider—take all those facts into consideration, to determine whether or not there was any co-operation among these parties; whether this assembling together of all these men was the result of mere accident, or whether it

was the result of concerted action. If it was the result of concerted action, that is evidence of the combination. I might say here that the Court, possibly, and the jury might be relieved of any burden upon that question, because defendants' counsel has admitted in his argument that there was a conspiracy that day, or that there was a conspiracy organized to do some unlawful act, but I still prefer to give you the law, and let you reach your own conclusion from the evidence. Now, it is not sufficient simply to show that there was an assemblage together of these men, by concerted action, but it must appear that assembling was for some unlawful purpose, in order to constitute a conspiracy. Men might, by concerted action, in large numbers meet together, and it would not constitute a conspiracy. Men might, for instance, meet on that day by some common arrangement, at Wardner, for the purpose of innocently carrying out some celebration. That would not be a conspiracy—it might be called a meeting by concert, but to make it a conspiracy it must appear that the meeting was for some unlawful purpose. Now, let me direct your attention to that, and recall to your mind the circumstances connected with this assemblage of these men. You will bear in mind that those men—a large number of them—were masked, and a large number of them were armed. In addition to that they took with them a large amount of powder—my recollection is, about 4,000 pounds. They not simply took that, but they took it forcibly. I think the testimony shows they broke open doors to take it—to take what they had no right to take. There is some intimation that the men supposed that this was a peaceable mission, but you are

aware that men who are on peaceable missions do not hide their faces and their countenances by masks, and they do not go armed, and they would not likely, on a peaceable mission, carry with them the amount of powder that they had on that day. Those are suggestions which ought to have convinced anyone who accompanied them, that this assemblage was not for a lawful purpose—on the contrary, it was for some unlawful purpose, and there were such suggestions as ought to have informed anyone along with them, that a crime was likely to be committed; but you can take, in addition to that, as further evidence that this assemblage was unlawful, what they actually did. Men are to be judged by what they do. We cannot enter into the minds of men and know what their intentions are, but their intentions must be judged by what they actually do. The facts show you that after these men had assembled at Wardner junction, or Kellogg, that certain crimes were committed there, and you are justified in presuming that these men went there with the expectation and intention of doing what they did. Then, you have before you, by the evidence, the fact of this gathering together, as I have called your attention to, and the further fact of the evidence that it was for some unlawful purpose. If you are convinced, then, that this assemblage was for an unlawful purpose, you have established by the testimony the existence of this conspiracy. The next question for you to determine is, What was the object of the conspiracy? Now, keep these facts separate in your mind: First, you must determine whether there was a conspiracy, and determine that by satisfying your minds whether or not these men were acting together by concert

of action, and whether it was for some unlawful purpose. Those two things being found, the conspiracy is established.

What was the object of the conspiracy? It is alleged in this indictment that the object of the conspiracy was to obstruct the passage of the United States mail. Undoubtedly, you must conclude that the chief design that these men had in view was not the seizure of the train, but was to enforce some plans they entertained against the Bunker Hill and Sullivan Company, and, as the evidence shows, they destroyed the mill. You are justified in concluding that this was a part, at least, of their intentions; for it is the law that men intend to do what they actually do, and you are fully justified in concluding that this was their object, from the general facts in the case, including the fact that they proceeded as directly as they could to do this particular act, but, notwithstanding you may find that this alleged conspiracy was formed for the purpose of destroying the mill, you cannot, in this case, hold anyone for that offense. We have nothing here whatever to do with the offense or the crime that was involved in the destruction of that property. That is a matter that belongs to other courts and to other forums. But, in connection with the destruction of that property, you must bear in mind the other part of the transaction. The charge here is a conspiracy to interfere with the United States mails, and while, as suggested, the chief object of these men was directed against the Bunker Hill and Sullivan Company, if, in carrying out that scheme and to aid in carrying it out, they planned, schemed, and arranged to seize this train, or that the taking of the train was a

part of their general plan, and you so believe from the testimony, you are justified in finding that one of the objects of the alleged conspiracy was to obstruct and retard the United States mail, as charged in the indictment. Moreover, I say to you that as they did take possession of the train, and thereby delayed and obstructed the mail—and there is no explanation that it was innocently or lawfully done—the law presumes that they intended to do just what they did, and if you find from the testimony that this alleged conspiracy existed and that one of its objects in carrying out their chief object was to seize this train, then all who belonged to the conspiracy committed the offense charged in the indictment; provided, the train in question carried the United States mail.

Now, upon that point, I call your attention to one phase of this case. It was shown here that these cars were not marked mail-cars, as is generally the fact with mail trains in the country, but it further appeared in evidence that these were the cars that had always carried the mail on that road. They had no cars there at any time marked "United States Mail-Car"; but in addition to all that, even if they had no knowledge whatever that these were mail-cars, they are presumed to know that they were mail-cars; they are presumed to intend what they actually do. If they seized a train carrying the mail, they are presumed to have known that, and are chargeable with it, just the same as if they had known that the mail was in that train. Of course the evidence shows, beyond any dispute, that the mail was on that train at the time the train was seized.

One of the consequences resulting after a conspiracy is established is this: that every member who belongs to the conspiracy is bound and held for every act or thing done or said by any other member of the conspiracy, during its existence, and it does not matter whether the party was present or not at the time the particular act was committed. I wish you would bear that particularly in mind, that if—when you conclude the conspiracy is formed, then each man who belongs to that conspiracy, who was a member of it, is responsible for everything that was said or done by any other member, whether he is present or not.

Now, that applies in this case here, in this way: It is in evidence here that some of these defendants lived at Wardner and some, I believe, up the canyon. It is certainly clear here, by the evidence, that some of these defendants were not up at Gem, or where the train was seized, at the time the train was seized, but that does not exculpate them. If you find that they belong to an organization—if you find that they belong to the conspiracy, it does not matter whether they were present when the train was seized or not—they are just as guilty of the seizure of the train as if they had been present and helped to take it. That is a part of the law that applies especially to conspiracies; that each member is responsible and liable for what any other member of the conspiracy says or does, during the existence of the conspiracy.

What evidence have you that applies to these defendants, or shows that they were members of this conspiracy? I do not propose to go over that, other than to invite your attention to the testimony which has been pretty fully

gone over by counsel and so called to your attention that I think you are not likely to forget it, but I say to you that anything that you find that any one of these defendants did that helped to carry out the general plans of that day is binding upon him. If you find that any of them went from Wardner down to where this train was coming in, and went with masks or went with guns, or if they said anything connected with it, showing that they were interested in it or taking a part in it, or if they were present there and apparently assisting or taking any part, it is all testimony for you to consider. I will add, however, that the mere fact that a party was present is not sufficient to bind him, or hold him a member of the conspiracy. He might have been present and looking on, and been an innocent party, so that it is not the mere presence of a party that should bind him, but it is his presence, taking some part, taking some interest, showing that he belongs in some way to the organization, or that he is assisting in carrying out what they are doing. Now, as I intimated before, what they did at Wardner or at Kellogg Junction is a part of the general plans of that day, and if you find men taking an active part at Wardner, it shows that they were a part of that combination—conspiracy—and hence, although they were not up when the train was taken, they are still guilty of what was done when the train was taken.

There are some other requests that counsel have asked me to give, but they are covered, I think, by what I have already stated. In fact, I think I have covered every proposition of law that has been asked.

I may here say, that counsel during the argument have made numerous suggestions, that the Court will instruct you so and so. I have not been able to keep track of all the suggestions that counsel have made in that way. Some that they have suggested were proper enough, and would have been proper for the Court to give, but I have preferred to give my own, and give you only such as I think are involved in the issues of the case, for I do not wish your mind to be encumbered with issues that do not belong there. I think of nothing else to give you, gentlemen. If I do, after you have retired, and after counsel have notified me of the exceptions that they have to my instructions, I may recall you, to give you additional instructions, but I think of none now.

The form of verdict here, as prepared by the clerk, is this: After the title of the cause, it proceeds as follows: We, the jury in the above cause, find the defendant Fred W. Garrett—then and there is left a blank for you to insert either guilty or not guilty, as you find. And we find the defendant Dennis O'Rourke—there is another blank to insert guilty or not guilty, as you find, and so on through with all the defendants who are on trial here. Their names are inserted, and after the name is the place for you to insert your finding, and you will infer from that you are not bound to find all guilty or all not guilty. You find according to your judgment. If you find one man not guilty, you will so enter it; if you find another guilty, you will so enter it, and so on through. I may add, it requires a concurrence of all your number to furnish a verdict; that is, that 12 must agree.

After you have carefully considered this case and

reached your conclusion, and filled up those blanks as indicated here by the form of the verdict, the foreman you will select will sign this verdict, and you will bring it into court. The same officers who have had charge will continue in charge.

Now, at this time, bailiffs are sworn to take charge of the jury.

The COURT.—Gentlemen, whatever exceptions you desire to reserve may be noted after the jury retires, and made as if made before, and if I desire to further instruct the jury I can recall them.

Now, at this time, the jury retires under the charge of sworn bailiffs.

Mr. McNAMEE.—If the Court please, we desire to save an exception to the failure of the Court to give instructions as asked by the defendants, numbered one, three—

The COURT.—There is one instruction I forgot to give, and that is concerning the miners' union. I will recall the jury for that. I forgot that. I have it marked here, but forgot it.

Now, at this time, the jury is returned into court.

The COURT.—Gentlemen, I had one instruction that I had intended to give you, upon my own motion, but I overlooked my notes, and instead of giving mine, as I had intended, I shall give you one requested by the defendant, as your No. 3 (referring to Mr. McNamee).

Mr. McNAMEE.—Yes, sir.

The COURT.—That is concerning the miners' union being interested and engaged in this, and I give you this instruction:

"You are instructed that the organizations referred to in the evidence in this case as miners' unions are presumed to be lawful organizations—that is, organizations for lawful purposes—and you are to be governed by such presumption unless the evidence in the case convinces you, beyond a reasonable doubt, that they were formed for illegal or unlawful purposes. It does not necessarily follow that if some of the members of an organization for lawful purposes conspired and agreed to willfully and maliciously carry out unlawful objects, that all the members of the organization are guilty of the conspiracy. The only theory upon which all the members of the organization could be held as conspirators would be, that the objects of the organization were to willfully and maliciously carry out such unlawful objects, and that they knowingly connected themselves therewith, or remained with such organization after its unlawful objects were known to them. It might be that an organization had objects that were entirely lawful, and some members go outside of the lawful objects and combine willfully and maliciously to pursue an object unlawful; in such a case, only the persons so combining would be conspirators."

Now, I give you that, gentlemen, because something has been said about the miners' unions here. It amounts simply to this, that we have no evidence here that the miners' unions are organized for an unlawful purpose, and, of course, until that was shown, all the members of the organization cannot be held for a conspiracy. Of course, if it appeared here that they were organized for an unlawful purpose, then each member of the union could be held; but it does not appear. Only those members of

the organization can be held who are shown by the evidence to have taken a part in it. So you will bear that in mind. It is not the organization, as an organization, can be held—simply the members who may have been shown by the evidence to have taken part or become members of the conspiracy. Now, with that suggestion, you may retire.

JAS. J. BEATTY,
Judge.

(Jury retires.)

The Court denied said motion for a new trial, to which ruling defendants then and there duly excepted.

The said Court thereupon sentenced the defendant Dennis O'Rourke to imprisonment in the State Prison of California at San Quentin, California, for the period of twenty months, and to pay a fine of $1,000.00, and sentenced each of the defendants C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, John Lucinetti, Arthur Wallace, P. F. O'Donnell, Mike Malvey, and Francis Butler, to imprisonment in the State Prison of California at San Quentin, California, for the period of twenty-two months and to pay a fine of $1,000.00. That to said judgment and sentence the defendants, and each of them, then and there duly excepted.

In commemoration of all of which, this —— day of ————, 1900, and within the time allowed by law and the order of this Court, the defendants present this, their bill of exceptions, and pray that the same may be settled and allowed as correct and signed by the Judge of said Court.

PATRICK REDDY.
PETER BREEN.
CLAY McNAMEE.

The within and foregoing bill of exceptions is this day settled and allowed as correct, except that some of defendants' requests for instructions above stated as refused, were in effect given in the general charge of the Court; and it is ordered that said charge be incorporated in said bill of exceptions, and with this modification this foregoing bill of exceptions is allowed, counsel for both parties having agreed thereto.

March 12, 1900.

JAS. H. BEATTY,
United States District Judge.

[Endorsed]: No. 410. Bill of Exceptions. Filed Feb. 6th, 1900. A. L. Richardson, Clerk. Filed after settlement March 12th, 1900. A. L. Richardson, Clerk.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARON, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. G. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURKE, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARY, PAT. CORARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Assignment of Errors.

The defendants in this action, in connection with their petition for a writ of error, make the following assignment of errors, which they aver occurred upon the trial of said action, to wit:

I.

The Court erred in denying defendants' motion to quash the indictment filed against the defendants herein.

II.

The Court erred in denying defendants' motion to require the prosecution to elect whether it would try the defendants on the first, second, or third counts contained in said indictment, or upon all the counts thereof.

III.

The Court erred in overruling the demurrer to the indictment.

IV.

The Court erred in denying defendants' request to exercise a fourth peremptory challenge during the impanelment of the jury, and in refusing to allow defendants more than three peremptory challenges to the jury.

V.

The Court erred in limiting the number of witnesses, at the expense of the Government, for the defendants, to twenty; and in refusing to allow the defendants more than twenty witnesses at the expense of the Government.

VI.

The Court erred in denying the defendants' request for a subponea duces tecum directed to H. M. Davenport, commanding him to appear in said court and bring with him the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, and Jos. Kendall, taken at the coroner's inquest upon the bodies of James Cheyne and John Smith in Shoshone county, Idaho, and in refusing to order that said subpoena be issued.

VII.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "What official position, if any, did you occupy in that union on the 29th of April?"

VIII.

The Court erred in overruling the defendants' objection to the question asked the witness John Clark: "State whether or not that is a union mine; that is, the Standard mine, employs union labor—members of the union."

IX.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "Mr. Clark, will you state where the different unions are located in the Coeur d'Alene country?"

X.

The Court erred in denying defendants' motion to strike out the answer of the witness John Clark: "They were standing around talking about waiting for the train coming up, when we were all going down to Wardner."

XI.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "You may state what their object was in going to Wardner."

XII.

The Court erred in allowing the witness John Clark to answer: "That morning when we came off of the night shift we was informed we were to go to Wardner."

XIII.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "From whom did you get that information, a member of the union?"

XIV.

The Court erred in denying defendant's motion to strike out the answer of the witness John Clark: "No, sir; I do not know just how the information got to the mine, but I was told by the miners."

XV.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "Now, Mr. Clark, I desire you to state what you did that day, so far as the events of that morning are concerned, that is, going to Wardner."

XVI.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "State how you happened to go into a box-car."

XVII.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "State why you did not get into the passenger coach."

XVIII.

The Court erred in sustaining plaintiff's objection to the question asked the witness John Clark on cross-examination: "Did anybody talk to you about the evidence you should give on the trial of Corcoran, after you

got to Wallace at any time? State what was said to you and by whom."

XIX.

The Court erred in sustaining plaintiff's objection to the question asked the witness John Clark on cross-examination: "Do you know whether or not he is a stockholder in the Bunker Hill and Sullivan Mining and Concentrating Company?"

XX.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark upon cross-examination: "I will ask you if prior to the trial of Paul Corcoran, and on the day when you were called there as a witness on that trial, Mr. Mace Campbell did not address you in the sheriff's office and tell you that it would be better for you to stick to what you had said before the coroner's jury. Did you not testify in the District Court of the First Judicial District, in and for Shoshone County, on the trial of Paul Corcoran, as follows:

"Q. Was there anything said to you about your testimony at any time since your second arrest?

"A. No, sir.

"Q. At any time? A. No, sir.

"Q. Not to-day? A. Well, yes.

"Q. When?

"A. This morning I was approached by one man down here.

"Q. What is his name? A. Mace Campbell.

"Q. Go ahead.

"A. And he told me it was better for me to stick up to what I had said down before the coroner's jury—"

XXI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Mr. Ames, I will ask you what relation the Wardner union bears to the other miners' unions in the Coeur d'Alenes."

XXII.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "What was the report of that committee?"

XXIII.

The Court erred in overruling defendants' objection to the testimony of the witness Thomas Ames: "The meeting was closed then, and we all went to the Bunker Hill in a body to get the men that was still working in the Bunker Hill," and to all testimony of said witness of a similar character.

XXIV.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "I will ask you to state briefly what took place on the 29th of April—came under your observation, commencing in the morning. Well, what you did and what you saw."

XXV.

The Court erred in denying defendants' motion to strike out the testimony of the witness Thomas Ames: "Well, I went to Page's Hotel and found out what I could, in the morning, what was going on. In fact, I didn't find anything much, because no one seemed to know anything about it, only was to go to the depot at 11 o'clock to meet

a train. Two or three of the boys told me not to go down —to stay there. I went into Mr. Page's Hotel, Mr. Cox's store—."

XXVI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Did you have a statement from any member of the union that would lead you to believe it—cause you to believe it?"

XXVII.

The Court erred in denying defendants' motion and request that a subpoena duces tecum be issued and served upon S. H. Hays, W. E. Borah, and J. H. Hawley, requiring them to appear and bring with them books containing the shorthand notes of the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joseph Phifer, A. M. St. Clair, Jas. B. Pipes, and Jos. Kendall, taken at the inquest held upon the bodies of James Cheyne and John Smith in Shoshone county, Idaho.

XXVIII.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Was it not the talk among the members of the Wardner union that necessary force would be exerted to drive the non-union employees out of the camp, or prevent their working in the Bunker Hill and Sullivan, and was not that the talk among the members of the Wardner union?"

XXIX.

The Court erred in overruling the defendants' objection to the question asked the witness Thomas Ames:

"Would that rest in open meeting, any plans they might lay, or rest with a committee?"

XXX.

The Court erred in overruling defendants' objection to the question asked the witness Albert Burch: "Mr. Burch, I desire you to commence with the week preceding the blowing up of the Bunker Hill and Sullivan mill and relate briefly the occurrences so far as the troubles between the Wardner union and your company are concerned."

XXXI.

The Court erred in overruling defendants' objection to the answer of the witness Albert Burch: "About the 19th or 20th of April I discovered some notices posted up, reading as near as I can recollect it—."

XXXII.

The Court erred in denying defendants' motion to strike out that part of the answer of the witness Albert Burch as to what effect the notice had upon his mind: "Wardner, Idaho, April 13th, 1899. At a regular meeting of the Wardner miners' union, April 18th, W. F. M., held upon the above date, it was decided to request all men employed in and about the Bunker Hill and Sullivan mine to make application for membership in the Wardner miners' union immediately. (Signed) N. A. Flynn, Committeeman. That attracted my attention to the possibility of there being agitation in progress in the mine."

XXXIII.

The Court erred in overruling defendants' objection to the answer of the witness Albert Burch: "Well, all right.

In the afternoon or evening of that day, about half-past five——."

XXXIV.

The Court erred in overruling defendants' objection to the statement of the witness Albert Burch: "I told him to go ahead and make his address. As near as I can remember he said——."

XXXV.

The Court erred in overruling defendants' objection to the statement of the witness Albert Burch, as to what he had said to the employees of the Bunker Hill and Sullivan Company.

XXXVI.

The Court erred in sustaining plaintiffs' objection to the question asked the witness Albert Burch on cross-examination: "Did you give the following testimony on that occasion, Mr. Burch?" And in refusing to permit counsel for defendants to finish said question.

XXXVII.

The Court erred in overruling defendants' objection to the question asked the witness Walter Taylor: "I will ask you if you had any conversation with Mr. Ed. Boyle, president of the Wardner miners' union, on or about the 26th of April, relative to your going to work, or heard any statement made by Boyle in regard to you or men going to work in the Bunker Hill and Sullivan mine."

XXXVIII.

The Court erred in overruling defendants' objection to the question asked the witness I. T. Rouse: "State what

he said, if anything, about the Western Federation of Miners."

XXXIX.

The Court erred in overruling defendants' objection to the question asked the witness F. R. Culbertson: "I will ask you if you had any conversation with Mr. Corcoran on the morning of the 29th of April relative to where he was going that day, or where the members of the Burke union were going."

XL.

The Court erred in overruling defendants' objection to the testimony of the witness Emil Anderson that he did not work on April 29th, 1899; that on the morning he was told by some men there would be no work that day, and that there would be a meeting in the union hall; that he did not know who it was informed him but that he attended the meeting at the hall, and to all testimony of like character.

XLI.

The Court erred in denying defendants' motion to require the prosecution to produce the testimony of the witness Fred Funk taken at the coroner's inquest upon the bodies of James Cheyne and John Smith in Shoshone county, Idaho.

XLII.

The Court erred in denying defendants' motion to strike out the portion of the answer of the witness A. M. St. Clair referring to the defendant Malvey: "A. I have been in the penitentiary, yes. There is where I met Mr. Malvey."

XLIII.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny for the purpose of contradicting the witness.

XLIV.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny for the purpose of showing that said witness had given a different name at the time of his conviction than at this time.

XLV.

The Court erred in sustaining plaintiffs' objection to the defendants' offer to introduce the record of the conviction of the witness St. Clair for larceny for the purpose of showing the character of the witness.

XLVI.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny for the purpose of impeaching said witness.

XLVII.

The Court erred in sustaining plaintiffs' objection to the question asked the witness St. Clair upon cross-examination: "Did you deliver it to the coroner after you had signed it?"

XLVIII.

The Court erred in overruling defendants' objection to the question asked the witness St. Clair: "You stated you

were in the penitentiary; state to the jury whether you were pardoned out."

XLIX.

The Court erred in overruling defendants' offer to introduce in evidence the record of the sentence and the judgment-roll in the case wherein the witness St. Clair was convicted of larceny and sentenced to the penitentiary.

L.

The Court erred in overruling defendants' objection to the question asked the witness G. A. Olmstead: "What time do you go by there?"

LI.

The Court erred in denying defendants' motion to strike out the answer of the witness Olmstead: "Well, there was quite an excitement at Wardner. There was big gangs of masked men there, armed, and a great deal of excitement. Blowed up the mill."

LII.

The Court erred in denying defendants' motion to strike out the answer of the witness Olmstead: "Registered it at 11:45, I think the register shows."

LIII.

The Court erred in overruling defendants' objection to the testimony of the witness George K. Marshall as to the delay of the train at Wallace.

LIV.

The Court erred in overruling defendants' objection to the testimony of the witness Marshall as to the delay of the mail at Wardner.

LV.

The Court erred in overruling defendants' objection to the statement of the witness George A. Smith: "On the 28th the report was the men had gone to work in the Last Chance, and I supposed naturally the strike was over. On the morning of the 29th—I stayed at the mill boarding-house that night—the morning of the 29th, why—" and to any testimony as to the events occurring at the Bunker Hill and Sullivan mill.

LVI.

The Court erred in overruling defendants' objection to the question asked the witness George A. Smith: "Go on and state what you did."

LVII.

The Court erred in denying defendants' motion to strike out the answer of the witness George A. Smith: "Well, I left the boarding-house and went up to see what was going on—see what the trouble was."

LVIII.

The Court erred in overruling defendants' objection to the question asked the witness, Mrs. Tony Tubbs: "What came under your observation then in regard to the troubles between the union and the Bunker Hill and Sullivan mine?"

LIX.

The Court erred in overruling defendants' objection to the question asked the witness L. W. Hutton: "Was there anything on any of the cars in the way of a notice or mark to show that their cars were carrying United States mail?"

LX.

The Court erred in overruling defendants' objection to the answer of the witness J. H. Martin: "He said, when they got down to Wardner, they detailed about seventy-five men—throwed them out on to the left-hand side, along a ridge—high piece of ground. Said there was a lot of men went to the mill, placed dynamite in place."

LXI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Wright: "Why not?"

LXII.

The Court erred in ordering and compelling defendants to proceed with their defense and introduce testimony before the prosecution had closed its case.

LXII.

The Court erred in denying defendants' offer to introduce in evidence the record of the conviction for larceny of the witness A. M. St. Clair, and in refusing to permit the same to be introduced in evidence.

LXIII.

The Court erred in overruling defendants' motion to strike out all testimony of the witness A. Burch, Fred Funk, A. M. St. Clair, William McMurtrie, A. S. Crawford, Sophia Moffit, M. J. Sinclair, William Doherty, and James H. Martin.

LXIV.

The Court erred in denying the defendants the right to show to the jury by the witness J. H. Forney that the

prosecution had withheld evidence which would impeach certain witnesses for the prosecution, and that the prosecution had not acted in good faith toward the defendants.

LXV.

The Court erred in refusing to allow defendants to show by the witness J. H. Forney that the shorthand notes of the testimony taken before the coroner of Shoshone county, Idaho, upon the inquest on the bodies of James Cheyne and John Smith were withheld from the defendants, and that witness refused to produce them, and that the United States District Attorney prosecuting this case joined said Forney in opposition to defendants' request for said shorthand notes.

LXVI.

The Court erred in sustaining plaintiff's objection to the question asked the witness James B. Pipes, while said witness was testifying in rebuttal: "You remember that very distinctly—those expressions—and you expect now that the jury will be excited, do you not?"

LXVII.

The Court erred in not striking out all of the testimony concerning the action of the parties engaged in blowing up the Bunker Hill mill, and all declarations and statements of the parties thus engaged, and all testimony concerning the actions and declarations of the members of the various miners' unions concerning their actions and intentions in reference to driving away the employees of the Bunker Hill and Sullivan Mining and

Concentrating Company, and all testimony concerning the acts of the miners' unions.

LXVIII.

The Court erred in not striking out all the testimony concerning any conspiracy on the part of the members of the various miners' unions to blow up or injure the Bunker Hill mill, or to interfere with the employees of the Bunker Hill and Sullivan Mining and Concentrating Company, or concerning any conspiracy except the conspiracy alleged in the first count of the indictment.

LXIX.

The Court erred in not striking out all of the evidence concerning the acts, declarations, or statements of any person or persons not shown to be indicted with the defendants or shown to be engaged in the conspiracy alleged in the first count of the indictment.

LXX.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered I:

"The first count of the indictment charges that the defendants named therein, together with others, did, on the 29th day of April, A. D. 1899, at the county of Shoshone, State of Idaho, unlawfully, wickedly, and maliciously confederate and conspire together to commit an offense against the United States; that is to say, to unlawfully, willfully, maliciously, and knowingly obstruct and retard the movement and passage of a certain railway car and train over the lines and tracks of the Northern Pacific Railway Company, then carrying said

United States mail, and that to effect the object of the said conspiracy, the defendants, with others, on the 29th day of April, A. D. 1899, at said county of Shoshone, did then and there unlawfully, forcibly, maliciously, and knowingly delay, arrest, obstruct, and retard the movement and passage of said railway car and train over the lines and tracks of the Northern Pacific Railway Company, by the said Northern Pacific Railway Company being then and there engaged in the business of a common carrier of the mails of the United States, which said railway car and train were then and there carrying and transporting the mails of the United States, by then and there willfully, knowingly, maliciously, and forcibly arresting, delaying, stopping, obstructing, and backing said mail-car and train, as aforesaid.

"The other two counts contained in the indictment have been dismissed.

"Said first count is drawn under section 5,440 of the Revised Statutes of the United States, which reads as follows:

" 'Section 5,440. If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more of such parties committing any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty,' etc.

"This is the definition of the conspiracy alleged in said first count.

"You will observe that it is alleged in the first count of the indictment that the object of the conspiracy was to willfully and knowingly obstruct and retard the pas-

sage of the United States mail over the lines and tracks described therein. This is an offense against the United States, and is defined in section 3,995 of the Revised Statutes of the United States, which reads as follows:

" 'Section 3,995. Any person who shall knowingly and willfully obstruct and retard the passage of the mail, or any carriage, horse, or driver, or carrier carrying the same, shall for every such offense be punishable,' etc., but the offense described in section 3,995 of the Revised Statutes is not the offense for which the defendants are on trial.

"The defendants are being tried for the offense of conspiring to commit that crime. The offense, you perceive, consists in two or more persons conspiring to commit the crime described in the first count, namely, to obstruct and retard the passage of the United States mails. Merely agreeing, combining, and confederating together to effect the object of the conspiracy is sufficient to constitute the offense if any one of the parties took a step toward its execution.

"The act set forth in the indictment, to-wit, obstructing and retarding the passage of the United States mail, is no part of the offense charged. The purpose of the law is, that a mere crime, however corrupt, shall not be punished as a crime unless it has led to some overt act."

LXXI.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered IV:

"If the defendants, or any of them, belonged to such organization or association for lawful purposes, and that

some of the members as individuals or combined with others, independent of the organization, to willfully and maliciously carry out the unlawful purpose as set forth in the indictment, but that such organization as a whole, or these defendants as individuals, did not join or participate in such combination, then such defendant or defendants cannot be held responsible for the acts of such combination or of such individuals."

LXXII.

The Court erred in refusing to give the jury the following instruction requested by the defendants and numbered V:

"If you find that the defendants, or any of them, did not combine to obstruct or retard the passage of the United States mail, as set forth in said first count, then such defendants should be acquitted."

LXXIII.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VI:

"The offense charged in said first count, to wit, obstruct and retard the passage of the mail as therein set forth, is an offense exclusively against the United States and cognizable only in the federal courts. It is not an offense against the State of Idaho. The stopping of the railroad trains and railroad cars is an offense against the State of Idaho and not an offense against the United States."

LXXV.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VII:

"The evil intent in committing the offense against the State of Idaho is not sufficient to constitute the offense charged in this indictment. To constitute the offense set forth in said indictment, the specific intent to violate the laws of the United States and to commit the crime of willfully and knowingly obstructing and retarding the United States mails, as set forth in said count, must be found to have existed in the minds of the defendants in order to justify a conviction."

LXXVI.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VIII:

"The meaning of the words 'knowingly' and 'willfully' is defined as follows: 'Doing or omitting to do a thing knowingly or willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it,' and to constitute the crime set forth in said first count, it must be proved, beyond a reasonable doubt, that the act of obstructing or retarding the passage of the mail was done knowingly and willfully by the defendants; that is to say, that they intended to do it."

LXXVII.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered IX:

"If you find from the evidence that a conspiracy was formed by a number of persons for the purpose and with the intent to commit a crime against the State of Idaho, and that incidentally the United States mail was obstructed or retarded by said conspirators, but without any knowledge and without any intention on the part of said conspirators to obstruct or retard the mail, such acts would not constitute an offense against the United States."

LXXVIII.

The Court erred in refusing to give to the jury the following instruction requested by the defendants, numbered XI:

"In order to make one an aider and abettor of conspirators, it is necessary that he should do or say something showing his consent to the felonious purpose and contributing to its execution."

LXXIX.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered XII:

"You are instructed that it makes no difference in this case whether the United States mails were obstructed or retarded. The offense in this case consists in the unlawful agreement or conspiracy to obstruct and retard. If there was no agreement or conspiracy to obstruct, then the defendants are not guilty of the crime and you should acquit them. Obstructing and retarding the passage of the United States mail is a distinct and inde-

pendent offense from that of conspiring to obstruct and retard."

LXXX.

The Court erred in overruling defendants' motion for an arrest of judgment.

LXXXI.

The Court erred in overruling defendants' motion for a new trial.

LXXXII.

The Court erred in entering judgment against the defendants.

LXXXIII.

The Court erred in sentencing the defendants to imprisonment in the State prison of California and to pay a fine of $1,000.00.

PATRICK REDDY,
PETER BREEN,
CLAY McNAMEE,
Attorneys for Defendants.

[Endorsed]: No. 410. Original. United States District Court, Ninth Circuit, Northern District of California. The United States of America, Plaintiff, vs. Louis Salla et al., Defendants. Assignment of errors. Filed March 13, 1900. A. L. Richardson, Clerk. Patrick Reddy, Peter Breen and Clay McNamee, Attorneys for Defendants.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs.

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown.

Defendants.

Petition for Writ of Error.

The defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Mike Malvey, H. Maroni, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, and C. R. Burris, feeling themselves aggrieved by the judgment made and entered by said Court on the 6th day of No-

vember, 1899, against said defendants, now come the said defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Mike Malvey, H. Maroni, P. F. O'Donnell, Arthur Wallace, Ed. Albinola and C. R. Burris, by their attorneys, Patrick Reddy, Peter Breem, and Clay McNamee, and petition said Court for an order allowing these defendants a writ of error from the judgment herein, to the Honorable United States Circuit Court of Appeals, for the Ninth Circuit, sitting at the city of San Francisco, State of California, according to the laws of the United States in that behalf made and provided, and that an order be made fixing the security which defendants shall furnish upon said writ of error.

PATRICK REDDY,
PETER BREEN,
CLAY McNAMEE,
Attorneys for said Defendants.

[Endorsed]: Original. No. 410. United States District Court, Ninth Circuit, District of Idaho. The United States of America, Plaintiff, vs. Louis Salla et al., Defendants. Petition for writ of error. Filed March 13, 1900. A. L. Richardson, Clerk. P. Reddy, Peter Breen, and Clay McNamee, Attorneys for Defendants.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Order for Writ of Error.

This 13th day of March, 1900, came the defendants, Louis Salla, Francis Butler, John Lucinetti, Dennis O'Rourke, Mike Malvey, H. Maroni, P. F. O'Donnell, Arthur Wallace, Ed. Albinola, and C. R. Burris by their

attorneys, Patrick Reddy, Peter Breem, and Clay McNamee, and filed herein and presented to the Court their petition, praying for the allowance of a writ of error, intended to be urged by said defendants, and said defendants also having filed herein an assignment of errors as provided by law, on consideration whereof, it is ordered that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment hereinbefore, on the 6th day of November, 1899, made and entered against defendants, be, and the same is hereby, allowed, and that a certified transcript of the record be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, sitting at the city of San Francisco, State of California, upon a bond being given and approved by the undersigned Judge, conditioned in the sum of three hundred dollars, that the said defendants shall prosecute their writ to effect, and, if they fail to make their plea good, shall answer all costs.

Dated March 13th, 1900.

JAS. H. BEATTY,

District Judge, District of Idaho.

[Endorsed]: Original. No. 410. United States District Court, Ninth Circuit, District of Idaho. The United States of America, Plaintiff, vs. Louis Salla et al., Defendants. Order for writ of error. Filed March 13, 1900. A. L. Richardson, Clerk.

In the District Court of the United States, within and for the District of Idaho.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JOHN DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, and Others Whose True Names are to the Grand Jurors Unknown,

Defendants.

Bond on Appeal.

Know all men by these presents, that we, Timothy Regan and Leo P. Grunbaum, both of Boise City, Ada county, State of Idaho, are held and firmly bound unto the United States of America in the sum of $300.00, for the payment of which, well and truly to be made, we

bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Whereas, the above-named defendants have prosecuted or are about to prosecute a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the verdict and judgment rendered in the above-entitled action made and entered November 6th, 1899:

Now, therefore, the condition of the obligation is such that if the above-named defendants shall prosecute said writ of error to effect and answer all damages and costs, if they fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Dated this ——— day of March, 1900.

TIMOTHY REGAN.
LEO P. GRUNBAUM.

State of Idaho, }
County of Ada. } ss.

Timothy Regan and Leo P. Grunbaum, being severally duly sworn, each for himself deposes and says: That he is a resident and freeholder of Ada county, Idaho, and is worth the amount stated in the foregoing undertaking, as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

TIMOTHY REGAN.
LEO P. GRUNBAUM.

Subscribed and sworn to before me this 13th day of March, 1900.

C. W. HARTLEY,
Notary Public.

Above bond approved.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 410. In the United States District Court for the District of Idaho. Louis Salla et al., Plaintiffs in Error, vs. United States, Defendant in Error. Bond on appeal. Filed March 13, 1900. A. L. Richardson, Clerk.

UNITED STATES OF AMERICA.—ss.

Writ of Error.

The President of the United States, to the Honorable, the Judge of the District Court of the United States for the District of Idaho, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Louis Salla et al., defendants and plaintiffs in error, and the United States of America, plaintiff and defendant in error, a manifest error hath happened to the great damage of the said Louis Salla et al., plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to

the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 10th day of April next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 13th day of March, in the year of our Lord one thousand nine hundred.

[Seal] A. L. RICHARDSON,
Clerk of the Circuit and District Courts of the United States for the Ninth Circuit of the State of Idaho.

Allowed by:

JAS. H. BEATTY,
Judge.

Service of the within and foregoing writ of error accepted, together with a true copy thereof.

March 19, 1900.

R. V. COZIER,
United States District Attorney for the State of Idaho.

[Endorsed]: No. 410. District Court of the United States, Ninth Circuit, Northern Division of the State of

Idaho. Louis Salla et al., Plaintiffs in Error, vs. United States, Defendant in Error. Writ of error. Filed on return, March 26th, 1900. A. L. Richardson, Clerk.

UNITED STATES OF AMERICA.—ss.

Citation.

The President of the United States, to The United States of America, and R. V. Cozier, United States District Attorney for Idaho, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 10th day of April, 1900, pursuant to a writ of error duly issued and now on file in the clerk's office of the Circuit and District Courts of the United States for the Ninth Circuit, Northern Division of the State of Idaho, wherein Louis Salla, Frank Barony, Morris Flynn, Francis Butler, Napoleon Nevella, John Lucinetti, Dennis O'Rourke, Fred Shaw, Pat. Adudell, Mike Malvey, A. C. Austin, James Cazzaglio, John Doe Parker, George C. Calladge, William Wright, Ed. Boyle, Thomas Murry, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, C. J. Olson, Ed. Albinola, John Burt, Alex. Wills, Paul Corcoran, William Bundren, Joe Vella, Marcus Daly, Mike Wells, Dennis Larry, Pat. Gerard, C. R. Burris, and others whose true names are to the grand jurors unknown, are plaintiffs in error, and you are defendant in error, to show cause, if

any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 13th day of March, A. D. 1900, and of the independence of the United States the one hundred and twenty-fourth.

JAS. H. BEATTY,
United States District Judge of the State of Idaho.

Attest:

[Seal] A. L. RICHARDSON,
Clerk.

Service of the within and foregoing citation accepted, together with a true copy thereof, this ——— day of March, 1900.

March 19, 1900.

R. V. COZIER,
United States District Attorney for the State of Idaho.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Louis Salla et al., Plaintiffs in Error, vs. United States, Defendant in Error. Citation. Filed on return, March 26th, 1900. A. L. Richardson, Clerk.

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto re-

lating, be transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

[Seal] A. L. RICHARDSON,
Clerk.

In the District Court of the United States, for the Northern Division of the District of Idaho.

THE UNITED STATES,
Complainants,
vs.
LOUIS SALLA et al.,
Defendants.

Clerk's Certificate to Transcript.

I, A. L. Richardson, clerk of the District Court of the United States, in and for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 391, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled suit, which together constitute the transcript of the record and return to the annexed writ of error.

I further certify that the cost of the record herein amounts to the sum of $275.00, and that the same has been paid by the defendants.

Witness my hand and the seal of the said District Court affixed at Boise, Idaho, this 30th day of March, 1900.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 600. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis Salla, Frank Barony, Morris Flynn, Francis Butler, Napoleon Nevella, John Lucinetti, Dennis O'Rourke, Fred. Shaw, Pat. Adudell, Mike Malvey, A. C. Austin, James Cazzaglio, John Doe Parker, George C. Calladge, William Wright, Ed. Boyle, Thomas Murry, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, C. J. Olson, Ed. Albinola, John Burt, Alex. Wills, Paul Corcoran, William Bundren, Joe Vella, Marcus Daly, Mike Wells, Dennis Larry, Pat. Gerard, C. R. Burris, et al., Plaintiffs in Error, vs. The United States of America, Defendants in Error. Transcript of Record. Error to the District Court of the United States, for the District of Idaho.

Filed April 2, 1900.

F. D. MONCKTON,
Clerk.

No. 600.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

LOUIS SALLA, et al.,

PLAINTIFFS IN ERROR,

VS.

THE UNITED STATES OF AMERICA,

DEFENDANTS IN ERROR.

Brief of Plaintiffs in Error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

PATRICK REDDY,
J. C. CAMPBELL,
W. H. METSON,
Attorney for Plaintiffs in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Louis Salla, Frank Barony, Morris Flynn, Francis Butler, Napoleon Nevella, John Lucinette, Dennis O'Rourke, Fred. Shaw, Pat Adudell, Mike Malvey, A. C. Austin, James Cazzaglio, John Doe Parker, George C. Calladge, William Wright, Ed. Boyle, Thomas Murray, H. Maroni, Charley Garrett, P. F. O'Donnell, Arthur Wallace, C. J. Olson, Ed. Albinola, John Burt, Alex. Wills, Paul Corcoran, William Bundren, Joe Vella, Marcus Daly, Mike Wells, Dennis Larry, Pat. Gerard, C. R. Burris, and others whose true names are to the Grand Jurors unknown,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The indictment originally contained three counts. The first count charged that the defendants "on the 29th day

" of April, A. D. 1899, at the County of Shoshone, within " the Northern Division of the District of Idaho, and with- " in the jurisdiction of this Court, then and there being, " did then and there unlawfully, wickedly and maliciously " confederate and conspire together to commit an offense " against the United States, that is to say, to unlawfully, " willfully, maliciously, and knowingly delay, prevent, ob- " struct, and retard the movement and passage of a certain " railway car and train over the lines and tracks of the " Northern Pacific Railway Company by the said Northern " Pacific Railway Company, the said Northern Pacific " Railway Company then and there being engaged in " the business of a common carrier of the mails of the " United States, which said railway car and train were " then and there carrying and transporting the mails of " the United States," * * * and further charged that to effect the object of said alleged conspiracy said defendants "did then and there unlawfully, forcibly, ma- " liciously, and knowingly delay, arrest, obstruct, and re- " tard the movement and passage of a certain railway car " and train over the lines and tracks of the Northern Pa- " cific Railway Company by the said company," * * *.

In the second count of the indictment the defendants are accused of having seized, controlled, stopped, delayed and backed a certain car and train then and there containing the mails of the United States and being run and transported over the railway lines and tracks of the Northern Pacific Railway Company.

The third count is in effect the same as the second, except that the defendants are charged with having delayed the

United States mails being transported over the lines and tracks of the Oregon Railroad and Navigation Company.

The evidence shows that on the 29th day of April, 1899, a Northern Pacific train was boarded by a large number of men, between the towns of Burke and Wallace; that when the train reached Wallace, which is the terminus of that particular branch of the Northern Pacific Railway, some of these men compelled the engineer to run his train over the tracks of the Oregon Railroad and Navigation Company to Wardner Junction, a place about twelve miles west of Wallace.

The mob then proceeded to the mill of the Bunker Hill and Sullivan Mining and Concentrating Company, located near Wardner Junction, and destroyed it by the use of dynamite, after which the rioters dispersed and returned on the train to Wallace and the points from which they had come.

On the 26th day of October, 1899, the defendants, Fred W. Garrett (indicted under the name of Charley Garrett), Dennis O'Rourke, C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, W. V. Bundren (indicted under the name of William Bundren), Fred E. Shaw (indicted under the name of Fred Shaw), John Lucinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey and Francis Butler, were brought into Court to plead to the indictment theretofore filed against them.

Said defendants thereupon moved to quash said indictment (Tr., pp. 14 to 16), which motion the Court denied and defendants excepted. (Tr., p. 66.)

Defendants then filed their general demurrer and special

demurrer to said indictment (Tr., pp. 9 to 13), both of which were overruled by the Court and defendants excepted. (Tr., p. 66.)

Said defendants then filed a motion to require the prosecution to elect upon which count in the indictment it would proceed to trial (Tr., pp. 7, 8), which motion was denied and defendants excepted. (Tr., p. 66.)

Thereafter defendants moved the Court to have subpoenas issued and witnesses summoned for the defense at the expense of the United States, and in support thereof filed affidavits stating the materiality of the evidence and their inability to pay the expenses of obtaining said witnesses (Tr., pp. 92 to 120). The Court allowed the defendants to summon twenty witnesses at the expense of the United States, but denied the motion as to the request for other witnesses named in the affidavits of defendants, to which ruling the defendants excepted. (Tr., pp, 68, 69.)

Defendants at the same time requested that a subpoena *duces tecum* issue for H. M. Davenport, requiring him to appear in Court and produce the testimony of certain witnesses taken at the inquest upon the bodies of James Cheyne and John Smith, and in support thereof filed affidavits stating the materiality of said testimony. (Tr., pp. 92 to 120.) The Court denied the request and defendants excepted. (Tr., pp. 68, 69.)

Defendants at the same time requested that a subpoena *duces tecum* issue for H. M. Davenport, requiring him to appear in Court and produce the testimony of certain witnesses taken at the inquest upon the bodies of James Cheyne and John Smith, and in support thereof filed affi-

davits stating the materiality of said testimony. (Tr., pp. 92 to 120.) The Court denied the request, and defendants excepted. (Tr., pp. 68, 69.)

After the defendants had peremptorily challenged three persons called to act as jurors, they asked leave to exercise a fourth peremptory challenge, which request the Court denied, and defendants excepted. (Tr., p. 70.)

Thereupon a jury was empaneled and sworn to try the case.

The defendants also moved the Court that a subpoena *duces tecum* be issued and served upon S. H. Hays, W. E. Borah and J. H. Hawley, requiring them to appear and bring with them the books containing the shorthand notes of the testimony of certain witnesses given at the inquest held on the bodies of James Cheyne and John Smith (Tr., p. 290), which motion was denied and defendants excepted. (Tr., pp. 71, 72.)

At the close of the testimony for the prosecution the Court, on motion of the District Attorney, ordered that the second and third counts in the indictments be dismissed, and afterwards instructed the jury that it should consider only the first count in the indictment, i. e., the count charging the defendants with conspiracy to obstruct and retard the passage of the mails.

The jury returned a verdict of guilty, as charged in the indictment, against the defendants Dennis O'Rourke, C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, John Lucinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey and Francis Butler.

Thereafter said defendants filed and presented their motion for a new trial (Tr., p. 47), which was denied by the Court and defendants excepted. (Tr., p. 80.)

Defendants then filed and presented their motion for arrest of judgment (Tr., pp. 327 to 331), which was denied by the Court and defendants excepted. (Tr., p. 81.)

Thereupon the Court pronounced judgment against the defendants, adjudging that each of them pay a fine of $1,000.00, and stand committed until said fine is paid; and also sentenced the defendants C. R. Burris, Edward Albinola, Louis Salla, Henry Maroni, John Lucinette, Arthur Wallace, P. F. O'Donnell, Mike Malvey and Francis Butler to imprisonment in the California State's prison at San Quentin, California, for the term of twenty-two months, and the defendant Dennis O'Rourke to imprisonment in said prison for the term of twenty months. (Tr., pp. 82, 83.)

Defendants then sued out this writ of error.

THE QUESTIONS RAISED.

The questions involved are presented by a Bill of Exceptions and the Roll, and relate to various rulings of the District Court upon the pleadings and during the trial, and the insufficiency of the evidence to support the verdict.

First. The motion to quash the indictment sets forth that there is a misjoinder of counts in said indictment, in that the first count charges the defendants with the commission of a felony, and the second and third counts charge the commission of misdemeanors, and that the said several counts are not for the same act or transaction, or for two

or more acts of the same class of crimes or offenses which may be properly joined; but that the offenses alleged in the different counts are separate and distinct offenses, in nowise related to each other. (Tr., pp. 14 to 16.)

The Court denied the motion and defendants excepted.

Second. The defendants moved the Court to require the prosecution to elect as to which count it would proceed to try defendants on. (Tr., pp. 7, 8.)

The motion was overruled and defendants excepted.

Third. Each of the defendants filed affidavits in support of their motion to have subpoenas issued and witnesses summoned for the defense at the expense of the United States, and said affidavits stated the materiality of the evidence and the inability of the defendants to pay the expense of bringing said witnesses into Court. (Tr., pp. 92 to 120.)

The Court denied the motion in part as to witnesses for each defendant, and allowed the defendants to have twenty witnesses summoned at the expense of the United States, to which ruling the defendants excepted. (Tr., pp. 68, 69.)

Fourth. After the defendants had peremptorily challenged three persons called to act as jurors, they asked leave of the Court to exercise a fourth peremptory challenge, on the ground that defendants were on trial for the commisison of a felony, and were entitled to ten peremptory challenges. (Tr., p. 70.)

The Court denied the request and the defendants excepted.

Fifth. The defendants moved the Court that a subpoena *duces tecum* issue for H. M. Davenport, requiring

him to appear in Court and produce the testimony of certain witnesses taken at the inquest on the bodies of James Cheyne and John Smith. Many of the witnesses for the prosecution had testified at said inquest as to the alleged facts upon which they were examined in chief by the prosecution in this case, and defendants requested the testimony given at said inquest for the purpose of contradicting and impeaching said witnesses. The testimony referred to had been filed with and was in the custody of said H. M. Davenport, as Clerk of the District Court of the First Judicial District of the State of Idaho in and for Shoshone County, and within the jurisdiction of the Court before whom this case was tried. (Tr., p. 92 to 120.)

The Court denied the motion and defendants excepted.

Sixth. Defendants moved the Court that a subpoena *duces tecum* be issued and served upon S. H. Hays and W. E. Borah and J. H. Hawley, requiring them to appear and bring with them the books containing the shorthand notes of the testimony of certain witnesses given at the inquest held on the bodies of James Cheyne and John Smith in Shoshone County, Idaho. (Tr., p. 290.)

The Court denied the motion and defendants excepted.

Seventh. The District Court refused the following instructions requested by defendants:

"IV.

"If the defendants, or any of them, belonged to such organiation or association for lawful purposes, and that some of the members, as individuals, or combined with others, independent of the organization, to willfully and

maliciously carry out the unlawful purpose as set forth in the indictment, but that such organization as a whole, or these defendants as individuals, did not join or participate in such combination, then such defendant or defendants cannot be held responsible for the acts of such combination or of such individuals." (Tr., p. 42.)

Defendants excepted.

Eighth. The District Court refused the following instruction requested by defendants:

"V.

"If you find that the defendants, or any of them, did not combine to obstruct or retard the passage of the United States mail, as set forth in said first count, then such defendants should be acquitted." (Tr., p. 43.)

Defendants excepted.

Ninth. The District Court refused the following instruction requested by defendants:

"VI.

"The offense charged in said first count, to wit, obstruct and retard the passage of the mail, as therein set forth, is an offense exclusively against the United States, and cognizable only in the Federal Courts. It is not an offense against the State of Idaho.

"The stopping of railroad trains and railroad cars is an offense against the State of Idaho, and not an offense against the United States." (Tr., p. 43.)

Defendants excepted.

Tenth. The district Court refused the following instruction requested by the defendants:

"VII.

"The evil intent in committing the offense against the State of Idaho is not sufficient to constitute the offense charged in this indictment. To constitute the offense set forth in said indictment, the specific intent to violate the laws of the United States and to commit the crime of willfully and knowingly obstructing and retarding the United States mails, as set forth in said count, must be found to have existed in the minds of the defendants in order to justify a conviction." (Tr., p. 43.)

Defendants excepted.

Eleventh. The District Court refused the following instruction requested by the defendants:

"VIII.

"The meaning of the words 'knowingly' and 'willfully' is defined as follows: 'Doing or omitting to do a thing knowingly or willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it,' and to constitute the crime set forth in said first count, it must be proved, beyond a reasonable doubt, that the act of obstructing or retarding the passage of the mail was done knowingly and willfully by the defendants; that is to say, that they intended to do it." (Tr., pp. 43, 44.)

Defendants excepted.

Twelfth. The District Court refused the following instruction requested by the defendants:

"IX.

"If you find from the evidence that a conspiracy was formed by a number of persons for the purpose and with the intent to commit a crime against the State of Idaho, and that incidentally the United States mail was obstructed or retarded by said conspirators, but without any knowledge and without any intention on the part of said conspirators to obstruct or retard the mail, such acts would not constitute an offense against the United States." (Tr., p. 44.)

Defendants excepted.

Thirteenth. The Dictrict Court refused the following struction requested by the defendants:

"XI.

"In order to make one an aider and abettor of conspirators, it is necessary that he should do or say something showing his consent to the felonious purpose and contributing to its execution." (Tr., p. 44.)

Defendants excepted.

Fourteenth. The District Court refused the following instruction requested by the defendants:

"XII.

"You are instructed that it makes no difference in this case whether the United States mails were obstructed or retarded. The offense in this case consists in the unlawful

agreement or conspiracy to obstruct or retard. If there was no agreement or conspiracy to obstruct, then the defendants are not guilty of the crime charged and you should acquit them.

"Obstructing and retarding the passage of the United States mail is a distinct and independent offense from that of conspiring to obstruct and retard." (Tr., p. 45.)

Defendants excepted.

Fifteenth. The motion for a new trial raises the question that the verdict is contrary to law and the evidence in the case.

Many other questions are raised as to the admisison of and rejection of evidence.

SPECIFICATION OF ERRORS.

The following are the errors relied upon by Plaintiffs in Error to sustain the prayer for a reversal of the judgment:

I.

The Court erred in denying defendants' motion to quash the indictment filed against the defendants herein.

II.

The Court erred in denying defendants' motion to require the prosecution to elect whether it would try the defendants on the first, second, or third counts contained in said indictment.

IV.

The Court erred in denying defendants' request to exercise a fourth peremptory challenge during the impanel-

ment of the jury, and in refusing to allow defendants more than three peremptory challenges to the jury.

V.

The Court erred in limiting the number of witnesses, at the expense of the Government, for the defendants, to twenty; and in refusing to allow the defendants more than twenty witnesses at the expense of the Government.

VI.

The Court erred in denying the defendants' request for a subpoena duces tecum directed to H. M. Davenport, commanding him to appear in said court and bring with him the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes, Ed. Booth, and Jos. Kendall, taken at the Coroner's inquest upon the bodies of James Cheyne and John Smith in Shoshone County, Idaho, and in refusing to order that said subpoena be issued.

VII.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "What official position, if any, did you occupy in that union on the 29th of April?"

VIII.

The Court erred in overruling the defendants' objection to the question asked the witness John Clark: "State whether or not that is a union mine; that is, the Standard mine, employs union labor—members of the union."

IX.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "Mr. Clark, will you state where the different unions are located in the Coeur d'Alene country?"

X.

The Court erred in denying defendants' motion to strike out the answer of the witness John Clark: "They were standing around talking about waiting for the train coming up, when we were all going down to Wardner."

XI.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "You may state what their object was in going to Wardner."

XII.

The Court erred in allowing the witness John Clark to answer: "That morning when we came off of the night shift we was informed we were to go to Wardner."

XIII.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "From whom did you get that information, a member of the union?"

XIV.

The Court erred in denying defendants' motion to strike out the answer of the witness John Clark: "No, sir; I do

not know just how the information got to the mine, but I was told by the miners."

XV.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "Now, Mr. Clark, I desire you to state what you did that day, so far as the events of that morning are concerned, that is, going to Wardner."

XVI.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "State how you happened to go into a box-car."

XVII.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "State why you did not get into the passenger coach."

XVIII.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark on cross-examination: "Did anybody talk to you about the evidence you should give on the trial of Corcoran, after you got to Wallace at any time? State what was said to you and by whom."

XIX.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark on cross-examina-

tion: "Do you know whether or not he is a stockholder in the Bunker Hill and Sullivan Mining and Concentrating Company?"

XX.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark on cross-examination: "I will ask you if prior to the trial of Paul Corcoran, and on the day when you were called there as a witness on that trial, Mr. Mace Campbell did not address you in the sheriff's office and tell you that it would be better for you to stick to what you had said before the coroner's jury. Did you not testify in the District Court of the First Judicial District, in and for Shoshone County, on the trial of Paul Corcoran, as follows:

"Q. Was there anything said to you about your testimony at any time since your second arrest?

"A. No, sir.

"Q. At any time? A. No, sir.

"Q. Not to-day? A. Well, yes.

"Q. When?

"A. This morning I was approached by one man down here.

"Q. What is his name? A. Mace Campbell.

"Q. Go ahead.

"A. And he told me it was better for me to stick up to what I had said down before the coroner's jury—"

XXI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Mr. Ames,

I will ask you what relation the Wardner union bears to other miners' unions in the Coeur d'Alenes."

XXII.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "What was the report of that committee?"

XXIII.

The Court erred in overruling defendants' objection to the testimony of the witness Thomas Ames: "The meeting was closed then, and we all went to the Bunker Hill in a body to get the men that was still working in the Bunker Hill," and to all testimony of said witness of a similar character.

XXIV.

did you get that information, a member of the union?"

The Court erred in overruling defendants' objection to the qestion asked the witness Thomas Ames: "I will ask you to state briefly what took place on the 29th of April—came under your observation, commencing in the morning. Well, what you did and what you saw."

XXV.

The Court erred in denying defendants' motion to strike out the testimony of the witness Thomas Ames: "Well, I went to Page's Hotel and found out what I could, in the morning, what was going on. In fact, I didn't find anything much, because no one seemed to know anything about

it, only was to go to the depot at 11 o'clock to meet a train. Two or three of the boys told me not to go down—to stay there. I went into Mr. Page's Hotel, Mr. Cox's store—."

XXVI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Did you have a statement from any member of the union that would lead you to believe it—cause you to believe it?"

XXVII.

The Court erred in denying defendants' motion and request that a subpoena duces tecum be issued and served upon S. H. Hays, W. E. Borah, and J. H. Hawley, requiring them to appear and bring with them books containing the shorthand notes of the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joseph Phifer, A. M. St. Clair, Jas. B. Pipes, and Jos. Kendall, taken at the inquest held upon the bodies of James Cheyne and John Smith in Shoshone County, Idaho.

XXVIII.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Was it not the talk among the members of the Wardner union that necessary force would be exerted to drive the non-union employees out of the camp, or prevent their working in the Bunker Hill and Sullivan, and was not that the talk among the members of the Wardner union?"

XXX.

The Court erred in overruling defendant's objection to the question asked the witness Albert Burch: "Mr. Burch, I desire you to commence with the week preceding the blowing up of the Bunker Hill and Sullivan mill and relate briefly the occurrences so far as the troubles between the Wardner union and your company are concerned."

XXXII.

The Court erred in denying defendants' motion to strike out that part of the answer of the witness Albert Burch as to what effect the notice had upon his mind: "Wardner, Idaho, April 13th, 1899. At a regular meeting of the Wardner miners' union, April 18th, W. F. M., held upon the above date, it was decided to request all men employed in and about the Bunker Hill and Sullivan mine to make application for membership in the Wardner miners' union immediately. (Signed) N. A. Flynn, Committeeman. That attracted my attention to the possibility of there being agitation in progress in the mine."

XXXV.

The Court erred in overruling defendant's objection to the statement of the witness Albert Burch, as to what he had said to the employees of the Bunker Hill and Sullivan Company.

XXXVII.

The Court erred in overruling defendant's objection to the question asked the witness Walter Taylor: "I will ask

you if you had any conversation with Mr. Ed. Boyle, president of the Wardner miners' union, on or about the 26th of April, relative to your going to work, or heard any statement made by Boyle in regard to you or men going to work in the Bunker Hill and Sullivan mine."

XXXVIII.

The Court erred in overruling defendants' objection to the question asked the witness I. T. Rouse: "State what he said, if anything, about the Western Federation of Miners."

XXXIX.

The Court erred in overruling defendants' objection to the question asked the witness F. R. Culbertson: "I will ask you if you had any conversation with Mr. Corcoran on the morning of the 29th of April relative to where he was going that day, or where the members of the Burke union were going."

XL.

The Court erred in overruling defendants' objection to the testimony of the witness Emil Anderson that he did not work on April 29th, 1899; that on the morning he was told by some men there would be no work that day, and that there would be a meeting in the union hall; that he did not know who it was informed him but that he attended the meeting at the hall, and to all testimony of like character.

XLII.

The Court erred in denying defendants' motion to strike

out the portion of the answer of the witness A. M. St. Clair referring to the defendant Malvey: "A. I have been in the penitentiary, yes. There is where I met Mr. Malvey."

XLIII.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny for the purpose of contradicting the witness.

XLIV.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny for the purpose of showing that said witness had given a different name at the time of his conviction than at this time.

XLV.

The Court erred in sustaining plaintiffs' objection to the defendants' offer to introduce the record of the conviction of the witness St. Clair for larceny for the purpose of showing the character of the witness.

XLVI.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny for the purpose of impeaching said witness.

XLVIII.

The Court erred in overruling defendants' objection to the question asked the witness St. Clair: "You stated you were in the penitentiary; state to the jury whether you were pardoned out."

L.

The Court erred in overruling defendants' objection to the question asked the witness G. A. Olmstead: "What time do you go by there?"

LI.

The Court erred in denying defendants' motion to strike out the answer of the witness Olmstead: "Well, there was quite an excitement at Wardner. There was big gangs of masked men there, armed, and a great deal of excitement. Blowed up the mill."

LIV.

The Court erred in overruling defendants' objection to the testimony of the witness Marshall as to the delay of the mail at Wardner.

LVIII.

The Court erred in overruling defendants' objection to the question asked the witness, Mrs. Tony Tubbs: "What came under your observation then in regard to the troubles between the union and the Bunker Hill and Sullivan mine?"

LIX.

The Court erred in overruling defendants' objection to the question asked the witness L. W. Hutton: "Was there anything on any of the cars in the way of a notice or mark to show that their cars were carrying United States mail?"

LX.

The Court erred in overruling defendants' objection to the answer of the witness J. H. Martin: "He said, when they got down to Wardner, they detailed about seventy-five men—throwed them out on the left-hand side, along a ridge—high piece of ground. Said there was a lot of men went to the mill, placed dynamite in place."

LXI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Wright: "Why not?"

LXIII.

The Court erred in overruling defendants' motion to strike out all testimony of the witnesses A. Burch, Fred Funk, A. M. St. Clair, William McMurtie, A. S. Crawford, Sophia Moffit, M. J. Sinclair, William Doherty, and James H. Martin.

LXIV.

The Court erred in denying the defendants the right to show to the jury by the witness J. H. Forney that the pros-

ecution had withheld evidence which would impeach certain witnesses for the prosecution, and that the prosecution had not acted in good faith toward the deefendants.

LXV.

The Court erred in refusing to allow defendants to show by the witness J. H. Forney that the shorthand notes of the testimony taken before the coroner of Shoshone county, Idaho, upon the inquest on the bodies of James Cheyne and John Smith were withheld from the defendants, and that witness refused to produce them, and that the United States District Attorney prosecuting this case joined said Forney in opposition to defendants' request for said shorthand notes.

LXVI.

The Court erred in sustaining plaintiffs' objection to the question asked the witness James B. Pipes, while said witness was testifying in rebuttal: "You remember that very distinctly—those expressions—and you expect now that the jury will be excited, do you not?"

LXVII.

The Court erred in not striking out all of the testimony concerning the action of the parties engaged in blowing up the Bunker Hill mill, and all declarations and statements of the parties thus engaged, and all testimony concerning the actions and declarations of the members of the various miners' unions concerning their actions and intentions in reference to driving away the employees of the Bunker Hill and Sullivan Mining and Concentrating Com-

pany, and all testimony concerning the acts of the miners' unions.

LXVIII.

The Court erred in not striking out all the testimony concerning any conspiracy on the part of the members of the various miners' unions to blow up or injure the Bunker Hill mill, or to interfere with the employees of the Bunker Hill and Sullivan Mining and Concentrating Company, or concerning any conspiracy except the conspiracy alleged in the first count of the indictment.

LXIX.

The Court erred in not striking out all of the evidence concerning the acts, declarations, or statements of any person or persons not shown to be indicted with the defendants or shown to be engaged in the conspiracy alleged in the first count of the indictment.

LXXI.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered IV:

"If the defendants, or any of them, belonged to such organization or association for lawful purposes, and that some of the members as individuals or combined with others, independent of the organization, to willfully and maliciously carry out the unlawful purpose as set forth in the indictment, but that such organization as a whole, or these defendants as individuals, did not join or participate in such combination, then such defendant or defendants

cannot be held responsible for the acts of such combination or of such individuals."

LXXII.

The Court erred in refusing to give the jury the following instruction requested by the defendants and numbered V:

"If you find that the defendants, or any of them, did not combine to obstruct or retard the passage of the United States mail, as set forth in said first count, then such defendants should be acquitted."

LXXIII.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VI:

"The offense charged in said first count, to wit, obstruct and retard the passage of the mail as therein set forth, is an offense exclusively against the United States and cognizable only in the federal courts. It is not an offense against the State of Idaho. The stopping of the railroad trains and railroad cars is an offense against the State of Idaho and not an offense against the United States."

LXXV.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VII:

"The evil intent in committing the offense against the State of Idaho is not sufficient to constitute the offense

charged in this indictment. To constitute the offense set forth in said indictment, the specific intent to violate the laws of the United States and to commit he crime of willfully and knowingly obstructing and retarding the United States mails, as set forth in said count, must be found to have existed in the minds of the defendants in order to justify a conviction."

LXXVI.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VIII:

"The meaning of the words 'knowingly' and 'willfully' is defined as follows: 'Doing or omitting to do a thing knowingly or willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it,' and to constitute the crime set forth in said first count, it must be proved, beyond a reasonable doubt, that the act of obstructing or retarding the passage of the mail was done knowingly and willfully by the defendants; that is to say, that they intended to do it."

LXXVII.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered IX:

"If you find from the evidence that a conspiracy was formed by a number of persons for the purpose and with the intent to commit a crime against the State of Idaho, and that incidentally the United States mail was obstructed or retarded by said conspirators, but without any

knowledge and without any intention on the part of said conspirators to obstruct or retard the mail, such acts would not constitute an offense against the United States."

LXXVIII.

The Court erred in refusing to give to the jury the following instruction requested by the defendants, numbered XI:

"In order to make one an aider and abettor of conspirators, it is necessary that he should do or say something showing his consent to the felonious purpose and contributing to its execution."

LXXIX.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered XII:

"You are instructed that it makes no difference in this case whether the United States mails were obstructed or retarded. The offense in this case consists in the unlawful agreement or conspiracy to obstruct and retard. If there was no agreement or conspiracy to obstruct, then the defendants are not guilty of the crime and you should acquit them. Obstructing and retarding the passage of the United States mail is a distinct and independent offense from that of conspiring to obstruct and retard."

LXXXI.

The Court erred in overruling defendants' motion for a new trial.

BRIEF OF ARGUMENT.

I.

The Court erred in denying defendants' motion to quash the indictment filed against the defendants herein.

The indictment contains three counts, alleging three separate and distinct offenses.

The first count is founded on Section 5440 of the Revised Statutes of the United States charging a conspiracy to commit an offense against the United States, which we will hereafter endeavor to show is a felony.

The second and third counts are founded on Section 3995 of the Revised Statutes of the United States, for obstructing and retarding the United States mails, which is a misdemeanor.

The joinder is not authorized by Section 1024 of the Revised Statutes of the United States.

Roe on Crim. Proc., p. 56, and notes.

The offenses alleged are separate and distinct, founded upon different statutes and punishable by different penalties and triable by different methods.

It is alleged in the first and second counts that the offenses there alleged were committed on the railway lines and tracks of the Northern Pacific Railway Company.

The offense charged in the third count is alleged to have

been committed on the lines and tracks of the Oregon Railroad and Navigation Company.

That the offense charged in the first count is separate and distinct from the offenses charged in the second and third counts is apparent upon the face of the indictment. To show that they are not of the same class, we cite the case of Clune et al. *vs.* United States, 159 U. S., 590, 595, in which it is said:

"The language of the section is plain and not open to "doubt. A conspiracy to commit an offense is denounced "as itself a separate offense, and the punishment there- "for fixed by statute. * * * The power exists to sepa- "rate the conspiracy from the act itself and to affix dis- "tinct and independent penalties to each."

These offenses are not subject to the same punishment. Counts for conspiracy cannot be joined with counts for murder.

U. S. *vs.* Scott, 4 Biss., 29;
U. S. *vs.* Gaston, 28 Fed. Rep., 848.

Offenses cannot be joined under Section 1024, Revised Statutes of the United States, unless of the same class and incurring the same kind of punishment.

U. S. *vs.* Bennett, 17 Blatchf., 357;
U. S. *vs.* Peterson, 27 Fed. Cases (Case No. 16,037), 521;
U. S. *vs.* Sharp, 27 Fed. Cases (Case No. 16,265), 1046.

Felony and misdemeanor cannot be joined in one indictment.

1 Bishop's New Crim. Proc., Sec. 445, p. 275-6;
Wharton's Am. Crim. Law, Sec. 418.

Indictments for different offenses, not provable by the same evidence and in no sense resulting from the same series of acts, cannot be united for trial.

McElroy et al. *vs.* U. S., 164 U. S., 76.

Our contention is that the first count charged a felony. This raises the question: How is an offense determined to be a felony in the Federal Courts in the absence of express terms so designating it in the statute creating the same?

For many years this was a vexed question, hedged about with much doubt and uncertainty.

Two recent decisions by the Supreme Court of the United States are decisive of the point.

Bannon & Mulkey, *vs.* U. S., 156 U. S., 464;
Reagan *vs.* U. S., 157 U. S., 301.

In Bannon & Mulkey *vs.* U. S., Mr. Justice Brown said:

"By statute, in some of the States, the word 'felony' is "defined to mean offenses for which the offender, on con- "viction, may be punished by death or imprisonment in the "State prison or penitentiary."

In the Regan case, Mr. Justice Brewer said:

"It may be conceded that the present common under- "standing of the word (felony) departs largely from the

" technical meaning it had at the old common law. This
" departure is owing to the fact that the punishments other
" than death, to wit: forfeiture of the lands or goods of the
" offender, which formerly constituted the test of felony,
" are no longer inflicted, at least in this country, and to the
" further fact that in many of the States offenses are by
" statute divided into two classes, felonies and misdemean-
" ors, the former including all offenses punishable by death,
" or imprisonment in the penitentiary, and the latter those
" punishable by fine or imprisonment in a county jail; and
" in other States, in which no statutory classification is
" prescribed, many offenses punishable by imprisonment in
" a penitentiary are, in terms, declared to be felonies.
" These matters have thrown about the meaning of the
" word as ordinarily used no little uncertainty. Indeed, in
" Webster's Dictionary, after the common law definition of
" the term, there are quoted from John Stuart Mill these
" pertinent observations: 'There is not a lawyer who would
" 'undertake to tell what a felony is, otherwise than by
" 'enumerating the various offenses which are so called.
" 'Originally, the word "felony" had a meaning: it denoted
" 'all offenses the penalty of which included forfeiture of
" 'goods; but subsequent acts of Parliament have declared
" 'various offenses to be felonies, without enjoining that
" 'penalty, and have taken away the penalty from others,
" 'which continue, nevertheless, to be called felonies, in so
" 'much that the acts so called have now no property what-
" 'ever in common, save that of being unlawful and punish-
" 'able.' (1 Mill's Logic, 40.)

"*There is no statutory definition of felonies in the legis-*
"*lation of the United States. We must, therefore, look*
"*elsewhere for the meaning of the term.* The question was
" recently before us in Bannon & Mulkey *vs.* United States,
" 156 U. S., 464, 468, and Mr. Justice Brown, delivering the
" opinion of the Court, after referring to the statutory pro-
" visions in some of the States, said: 'But in the absence
" 'of such statute the word is used to designate such serious
" 'offenses as were formerly punishable by death, or by
" 'forfeiture of the lands or goods of the offender.'"
(Italics are ours.)

In substance, this decision holds, first, that we cannot look to the common law for a definition of felony; second, that there is no definition of felony in the legislation of the United States.

" We must, therefore, look *elsewhere* for the meaning of
" the term."

Quere: To what source does "elsewhere" refer?

The logic of the proposition is clear. There are but three sources of law: (1) the common law; (2) the Acts of Congress; (3) the statutes of the States.

The decision of the Supreme Court eliminates the first and second, and leaves the solution of the question to the third.

Referring to these statutes of the States, the Court says: " But in the *absence* of these statutes," etc., thereby clearly indicating that such statute, if there be one in the State, is decisive of the point.

In Idaho there is such a statute.

"A felony is a crime which is punishable with death or "by imprisonment in the territorial prison."

Rev. Stats. of Idaho, Sec. 6311.

Under the foregoing decisions conspiracy to commit an offense against the United States is a felony, because Section 5440 of the Revised Statutes of the United States provides that "all the parties to such conspiracy shall be liable "to a penalty of not more than ten thousand dollars, or to "imprisonment for not more than two years, or by both "fine and imprisonment, in the discretion of the Court."

II.

The Court erred in denying defendants' motion to require the prosecution to elect whether it would try the defendants on the first, second or third counts contained in said indictment.

The joinder of these several offenses in the indictment necessarily tended to embarrass the defendants in preparing their defense, and the Court should, therefore, have required the prosecution to elect.

Engelman *vs.* State, 2 Ind., 91;
State *vs.* Abrahams, 6 Ia., 117;
State *vs.* Cajean, 8 La. Ann., 109;
State *vs.* Porter, 26 Mo., 206;
State *vs.* Lincoln, 49 N. H., 464;
Kane *vs.* People, 8 Wend., 203, 211;
Com. *vs.* Gillespie, 7 Serg. & R., 469; 10 A. D;
Regina *vs.* Heywood, 1 Leigh & C., 451;

Wharton's Crim. Pl. & Pr., Sec. 294;
State *vs.* Bell, 92 Am. Dec., 663, note.

Where two or more distinct offenses are charged, the proper practice is to require the prosecuting officer to elect one of the offenses and confine himself to it.

State *vs.* Scott, 15 S. C., 436;
State *vs.* Nelson, 14 Rich., 169, 172;
State *vs.* Fidment, 35 Ia., 541.

If, by reason of the nature of the offenses charged, or because of the mode of proofs, there is a possibility of prejudice to defendant at his trial, he may move the prosecution to elect.

Pettes *vs.* Com., 126 Mass., 242.

Where an indictment joined two felonies and a misdemeanor, held, error not to compel election.

State vs. Nelson, 94 Am. Dec., 130 (S. C.).

If it is manifested that the discretion of the Court has been abused to the obvious and palpable detriment of the accused, a new trial will be granted.

State *vs.* Gray, 37 Mo., 464;
State *vs.* Danhert, 42 Mo., 242;
Womack *vs.* State, 7 Cald., 508;
State *vs.* Nelson, 14 Rich., 169, 172;
Fisher *vs.* State, 33 Tex., 772;
Sims *vs.* State, 10 Tex. App., 131.

If the joinder is not proper, i. e., two or more felonies of different grade, or offenses of different class, viz., felony and misdemeanor, the Court should compel election.

McElroy *vs.* U. S., 164 U. S., 76, 80.

The District Attorney dismissed the second and third counts of the indictment, but not until after the testimony on both sides had been closed, and the defendant had suffered all the injury which could result from the failure to elect at an earlier stage of the proceedings. (Tr., p. 321.)

The defendants were prejudiced by the refusal of the Court to compel the prosecution to elect between the counts. The day after the refusal an application was made by which the defendants asked for process at the expense of the United States to compel the attendance of a number of witnesses (about forty in all) for the defense. The Court allowed the motion for but twenty witnesses.

If the defendants had been advised that they would not be compelled to defend on the second and third counts, they would have made a different selection of witnesses, and would have summoned only such as could testify upon the charge of conspiracy alleged in the first count.

They were thus compelled to exhaust the process allowed them upon witnesses who could not assist them in defending against the charge contained in the first count.

The election should have been made at the close of the evidence on the part of the Government and before the defendants put in their case.

State *vs.* Gomes, 57 Pac Rep. 262 (Kas.);

Gardes *vs.* U. S., 87 Fed., 172;

State *vs.* Fidment, 35 Ia., 541;
State *vs.* Scott, 15 S. C., 436;
State *vs.* Nelson, 4 Rich., 169-172.

It was prejudicial to the defendants to compel them to exhaust their witnesses in defending against the charges contained in the second and third counts. The crimes were alleged to have been committed on different railroads and at different places.

The defendants were also prejudiced by the admission of evidence on the part of the prosecution in support of the second and third counts, which would have been inadmissible if the defendants had been tried only for the conspiracy alleged in the first count, and which tended to prejudice the defendants and confuse the jury.

IV.

The Court erred in denying defendants' request to exercise a fourth peremptory challenge during the impanelment of the jury, and in refusing to allow defendants more than three peremptory challenges to the jury.

The Court below limited the defendants to three peremptory challenges. (Tr., p. 70.)

This was reversible error.

Section 819, Rev. Sts. U. S., provides as follows:

"When the offense charged is treason, or a capital "offense, the defendant shall be entitled to twenty and the "United States to five peremptory challenges. On the trial "of any other felony, the defendant shall be entitled to ten

"and the United States to three peremptory challenges."
* * *

Our contention is that the defendants were charged with a felony, to wit: conspiracy, and should have been allowed ten peremptory challenges.

As to whether the charge contained in the first count in the indictment constitutes a felony, we have cited authorities under Assignment of Error No. II.

V.

The Court erred in limiting the number of witnesses at the expense of the Government, for the defendants, to twenty, and in refusing to allow the defendants more than twenty witnesses at the expense of the Government.

Section 878, Rev. Stats. U. S., provides that:

"Whenever any person indicted in a Court of the United "States makes affidavit, setting forth that there are wit- "nesses whose evidence is material to his defense; that he "cannot safely go to trial without them; what he expects "to prove by each of them; that they are within the dis- "trict in which the Court is held, or within one hundred "miles of the place of trial; and that he is not possessed of "sufficient means, and is actually unable to pay the fees of "such witnesses, the Court in term, or any Judge thereof "in vacation, may order that such witnesses be subpoenaed, "if found within the limits aforesaid." * * *

The affidavits presented by the defendants (Tr., pp. 92 to 120, set forth all the facts required by this statute.

It is provided that the Court "in term, or any Judge

"thereof in vacation, *may* order that such witnesses be "subpoenaed." (Italics are ours.)

When an affidavit containing the facts required is properly presented, is it discretionary with the Court whether it will order such witnesses to be subpoenaed? May the Court refuse to issue the subpoena for any witnesses on the part of the defense, under this section?

We have been unable to find any case wherein this question has been passed upon. If it is discretionary, of course it must be a legal discretion, and if the affidavit states all the facts required by the statute, and there is nothing in it to intimate to the Court that the affidavit is not made in good faith, the Court would not be warranted in refusing to order the witnesses named therein subpoenaed.

If the testimony of the witnesses as set forth in the affidavit would be simply cumulative, the Court might reduce the number, but nothing of that kind appears in these affidavits.

Thirteen defendants were to be tried, and were required to defend upon three counts. They requested about forty witnesses. This does not seem to be an unreasonable number, especially as the Government called forty-nine witnesses for the prosecution.

VI.

The Court erred in denying the defendants' request for a subpoena duces tecum directed to H. M. Davenport, commanding him to appear in said Court and bring with him the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Jos. Phifer, A. M. St. Clair, Jas. B. Pipes,

Ed. Booth, and Jos. Kendall, taken at the coroner's inquest upon the bodies of James Cheyne and John Smith in Shoshone County, Idaho, and in refusing to order that said subpoena be issued.

Each of the defendants filed an affidavit and a request for the issuance of a subpoena *duces tecum* for H. M. Davenport, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, commanding him to attend as a witness and bring with him the testimony of J. M. Porter, M. J. Sinclair, John Clark and others therein named, taken at the inquest on the bodies of James Cheyne and John Smith, in Shoshone County, Idaho, and stating that said testimony had been filed with said Clerk. (Tr., pages 92-120.)

The testimony of said Davenport was material and important in order to identify the testimony taken at said inquest and filed with him, and said testimony was material to the defendants for the purpose of cross-examining, contradicting and impeaching the witnesses to be called by the prosecution at the trial of this case, and who also testified before the grand jury which indicted the defendants, and whose names are endorsed on said indictment.

Defendants' affidavits also show that each defendant was unable to pay the expenses and fees of said witnesses, and also that they could not obtain a certified copy of said testimony from the Clerk, because said testimony had been ordered sealed up by the Judge of the District Court of the First Judicial District of the State of Idaho. (Tr., pp. 92 to 120.)

The process requested was proper and the only one available to the defendants for the purpose of securing the testimony and documents desired.

24th Am. & Eng. Enc. of Law, p. 173, *et seq.*

The contents of the documents were not privileged. Section 8382, Rev. Stats. of Idaho, provides:

"The testimony of the witnesses examined before the "Coroner's Jury must be reduced to writing by the Coro- "ner, or under his direction, and forthwith filed by him, "with the inquisition, in the office of the Clerk of the Dis- "trict Court of the county."

The writings when filed with the Clerk of the District Court become a public record.

Section 5965, Revised Statutes of Idaho, provides as follows:

"Every citizen has a right to inspect and take a copy of "any public writing of this Territory, except as otherwise "expressly provided by statute."

Section 5968, Revised Statutes of Idaho, provides:

"Public writings are divided into four classes:
"1. * * *
"2. Judicial records.
"3. Other official documents.
"4. * * *."

And Section 5973 reads:

"A judicial record is the record or official entry of the

" proceedings in a Court of justice, or of the official act of a " judicial officer in an action or special proceeding."

The testimony is not a privileged communication, nor does it embody State secrets.

> Greenleaf on Ev., Vol. 1 (14th Ed.), Sec. 250;
> Rapelje's Law of Witnesses, Sec. 258.

The source from which the information is obtained in a criminal action may be a State secret, but whenever a witness has testified and the law requires that his testimony be filed as a public record, we respectfully submit that it cannot be regarded as a State secret, and when the prosecution places a party upon the witness stand to testify against a defendant, the right to cross-examine and impeach him cannot be denied upon any pretense whatever.

It is legitimate cross-examination to show that a witness has made other statements inconsistent with his present testimony.

Section 6083, Revised Statutes of Idaho, provides:

"A witness may also be impeached by evidence that he " has made at other times, statements inconsistent with his " present testimony; but before this can be done the state- " ments must be related to him, with the circumstances of " time, places and persons present, and he must be asked " whether he made such statements, and, if so, allowed to " explain them. If the statements be in writing, they must " be shown to the witness before any question is put to him " concerning them."

The testimony given by the witnesses before the Coroner's jury was in writing, and before the defendants could

put any questions to the witnesses it was necessary to submit that writing to them.

The law guarantees the defendants the right of cross-examination upon such matters.

The defendants could not, under the circumstances, wait until the witnesses were examined in chief and then ask the Court to wait until a subpoena *duces tecum* could be served upon Mr. Davenport. They were in duty bound to prepare their defense, and the only time when the testimony taken before the Coroner could be used in the cross-examination or impeachment of the witnesses was after their examination in chief and during cross-examination.

The ruling of the Court was to the effect that the defendants were not entitled to, and should not have the subpoena *duces tecum* at any time.

As stated above, the law guarantees the defendant the right of cross-examination upon such matters, and therefore the Court had no right to withhold the only means by which such cross-examination could be made.

Defendants being entitled to such cross-examination, they were entitled to compulsory process for the production of such evidence.

A copy, certified or otherwise, of the testimony would be unavailable for the purposes of cross-examination, for the law requires that the writing be first submitted to the witness before any question is put to him concerning it, and the witness cannot be required to testify upon the presentation to him of a copy, whether certified or not.

The District Court of the First Judicial District of the State of Idaho, upon the filing of the testimony referred to

by the Coroner with the Clerk of said Court, ordered that said package be sealed, and that no one should be permitted to open it, without an order of the Court. (Tr., p. 93.)

This order, we contend, was absolutely void upon its face. The Court had no power to order a public record to be sealed up or to prevent any citizen from inspecting the same.

In Daly *vs.* Dimock, 55 Conn., 579, it was held that under the Connecticut Revised Statutes, Sections 2009, 2011, 2016, providing that the Coroner at an inquest shall reduce to writing the testimony of all the witnesses examined before him, and shall make a return to the Clerk of the Superior Court of his county of all the testimony so taken, and of his findings, or of the verdict of the jury, a defendant indicted for the murder of a person over whom an inquest had been held has a right to inspect all the papers composing the Coroner's return, after it has been filed with the Clerk.

"We do not deem it important," said the Court by Carpenter, J., "to consider whether the testimony, when re-
"duced to writing, as required by law, and lodged with the
"Clerk of the Superior Court, is or is not, in a strict techni-
"nal sense, a public record. For the purposes of this case,
"we may concede that the duties of a Coroner are of a judi-
"cial nature, and that the verdicts of juries and the find-
"ings of Coroners are, in a general sense, matters of record.
"They are results and conclusions of judicial proceedings,
"and are clearly analogous to verdicts and judgments in
"ordinary Courts of justice."

19th A. & E. Ency. of Law, pp. 229-30, note;
People *vs.* Devine, 44 Cal., 452.

If the Court could seal up this record, it could seal up all the public records of the county. This action of the Court was contrary to and in direct violation of the provisions of the various statutes of Idaho above referred to.

The order was, in effect, a suppression or withholding of evidence material to the accused. In other words, a denial of the right of the defendants to show by the documents referred to that the witnesses confronting them, and upon whose testimony they might be deprived of their liberty, were false and unworthy of belief.

It is a wise provision of the law that criminal trials in this country must be public, and that the testimony for or against a person accused of crime cannot be kept secret, either for the protection of false witnesses or for any other reason.

If there had been no order of the Court to seal up the documents, could there be any question as to the right of the defendants to have such testimony produced for the purposes named? It was the duty of the Court to issue the process, and upon service of the same it was the duty of Mr. Davenport to obey the writ, unless he had some lawful excuse, the validity of which the Court is to judge.

Mr. Davenport could have produced the documents in Court without any violation of the order of the State Court, and it would have been then for the lower Court to determine whether the order was valid or void upon its face, and if void, to disregard it.

Amey *vs.* Long, 9 East., 473;
Corsen *vs.* Dubois, 1 Holt's Cas., 239;
Chaplain *vs.* Briscoe, 5 Smed. & M. (Miss.), 198;
Bull *vs.* Loveland, 10 Pick. (Mass.), 9;
U. S. *vs.* Hunter, 15th Fed. Rep., 712.

The materiality or immateriality of the document required by the writ does not affect the duty of the witness to produce, for of that the Court alone, and not the witness, is to be the judge.

Doe *vs.* Kelly, 4 Dowl. Pr. Cas., 273;
Rex *vs.* Russell, 7 Dowl., 693;
O'Toole's Est., 1 Tuck. (N. Y.), 39.

VII.

The Court erred in overruling defendant's objection to the question asked the witness John Clerk: "What official "position, if any, did you occupy in that union on the 29th "of April?" (Tr., p. 282.)

The witness Clark was not indicted or charged with any of the offenses alleged in the indictment, nor was it shown that he was in any way connected with the conspiracy alleged in the first count, or in the acts charged in the second and third counts. Therefore, what he said or did was not binding upon the defendants, and it was not shown that the defendants were present at the place referred to by the witness, or that any of them were in any way connected or concerned with any transaction related by the witness. There was no evidence at that time, or at any other time, tending to show the conspiracy alleged in the first count.

Blanchette *vs.* Holyoke St. Ry. Co., 55 N. E. Rep., 481.

The position the witness held in the union on the 29th of April, or at any other time, was irrelevant, and could not in any way affect any of the defendants. The indictment does not charge the unions, or the members thereof, as such, with being parties to the conspiracy alleged in the first count of the indictment.

VIII.

The Court erred in overruling the defendants' objection to the question asked the witness John Clark: "State "whether or not that is a union mine; that is, the Standard "mine, employs union labor—members of the union." (Tr., p. 282.)

Plaintiffs in error make the same argument as under Assignment of Error No. VII.

IX.

The Court erred in overruling defendant's objection to the question asked the witness John Clark: "Mr. Clark, "will you state where the different unions are located in "the Coeur d'Alene country?" (Tr., p. 282.)

The argument under Assignment of Error No. VII applies here.

X.

The Court erred in denying defendants' motion to strike out the answer of the witness John Clark: "They were

" standing around talking about waiting for the train com-
" ing up, when we were all going down to Wardner." (Tr., p. 283.)

The witness did not refer to any of the defendants, nor does it appear that the persons referred to as "they" meant the defendants, or were persons charged with crime in any of the counts of the indictment.

XI.

The Court erred in overruling defendants' objection to the question asked the witness John Clark "You may " state what their object was in going to Wardner." (Tr., p. 284.)

The question did not refer to the defendants, or any persons indicted with them, or to any persons shown by the evidence to have joined with them in the commission of any offense.

XII.

The Court erred in allowing the witness John Clark to answer: "That morning when we came off of the night " shift we were informed we were to go to Wardner." (Tr., p. 284.)

The answer of the witness was to the question contained in Assignment of Error No. XI, and was wholly indefinite as to the persons who were to go to Wardner, and did not include the defendants, or any persons named in the indictment.

XIII.

The Court erred in overruling defendants' objection to

the question asked the witness John Clark: "From whom "did you get that information, a member of the union?" (Tr., p. 284.)

The answer of the witness to this question was mere hearsay. It was not shown that any member of the union was charged in any of the counts of the indictment with being a party to the alleged conspiracy.

XIV.

The Court erred in denying defendants' motion to strike out the answer of the witness John Clark "No, sir; I do "not know how the information got to the mine, but I was "told by the miners." (Tr., p. 285.)

The answer was hearsay, and the argument under Assignment of Error No. VII also applies.

XV.

The Court erred in overruling defendants' objection to the question asked of the witness John Clark: "Now, Mr. "Clark, I desire you to state what you did that day, so far "as the events of that morning are concerned, that is, going "to Wardner." (Tr., p. 285.)

What the witness did on that day is not evidence against any of the defendants, for the reason it was not shown that Clark was a party to the conspiracy alleged in the first count of the indictment.

XVI.

The Court erred in overruling defendants' objection to

the question asked the witness John Clark: "State how "you happened to go into the box-car." (Tr., p. 285.)

The argument under the last Assignment of Error applies here.

XVII.

The Court erred in overruling defendants' objection to the question asked the witness John Clark: "State why "you did not get into the passenger coach." (Tr., p. 286.)

The same argument applies.

XVIII.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark on cross-examination: "Did anybody talk to you about the evidence you "should give on the trial of Corcoran, after you got to "Wallace, at any time? State what was said to you and "by whom."

XIX.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark on cross-examination: "Do you know whether or not he is a stockholder in "the Bunker Hill and Sullivan Mining and Concentrating "Company?"

XX.

The Court erred in sustaining plaintiffs' objection to the question asked the witness John Clark upon cross-examination: "I will ask you if prior to the trial of Paul Corcoran, "and on the day when you were called there as a witness

" on that trial, Mr. Mace Campbell did not address you in " the Sheriff's office and tell you that it would be better for " you to stick to what you had said before the Coroner's " jury. Did you not testify in the District Court of the " First Judicial District, in and for Shoshone County, on " the trial of Paul Corcoran, as follows:

" 'Q. Was there anything said to you about your testi- " 'mony at any time since your second arrest?

" 'A. No, sir.

" 'Q. At any time? A. No, sir.

" 'Q. Not to-day? A. Well, yes.

" 'Q. When?

" 'A. This morning I was approached by one man down " 'here.

" 'Q. What is his name? A. Mace Campbell.

" 'Q. Go ahead.

" 'A And he told me it was better for me to stick up to " ' what I had said down before the Coroner's jury.'" (Tr., 287.)

We think these assignments of error may be discussed together, as the same principle is involved in all. It was the object of these questions to ascertain whether the witness had been subjected to any influence or tampered with in any manner, and we think it was legitimate cross-examination.

XXI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Mr. Ames, " I will ask you what relation the Wardner union bears to

" the other miners' unions in the Coeur d'Alenes?" (Tr., p. 288.)

What relation the Wardner union bore to other miners' unions in the Coeur d'Alenes was irrelevant and incompetent; neither the union, nor the members thereof, as such, were indicted, or charged with being parties to the conspiracy alleged in the first count of the indictment.

XXII.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "What was " the report of the Committee?" (Tr., p. 288.)

The report of the committee was hearsay. Neither the miners' union, nor its members, as such, were charged in the first count of the indictment with being concerned in the conspiracy alleged.

XXIII.

The Court erred in overruling defendants' objection to the testimony of the witness Thomas Ames: "The meeting " was closed then, and we all went to the Bunker Hill in a " body to get the men that was still working in the Bunker " Hill,' and to all testimony of said witness of a similar character. (Tr., p. 289.)

The testimony was incompetent. Neither the resolution nor the action of the Wardner Miners' Union was evidence against any of the defendants, and the statement of the witness did not tend in any way to prove the conspiracy alleged in the said first count.

XXIV.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "I will ask "you to state briefly what took place on the 29th of April— "came under your observation, commencing in the morn- "ing. Well, what you did and what you saw." (Tr., p. 289.)

What the witness did was immaterial and irrelevant. What he saw was objectionable for the reasons above stated.

XXV.

The Court erred in denying defendants' motion to strike out the testimony of the witness Thomas Ames: "Well, I "went to Page's Hotel and found out what I could, in the "morning, what was going on. In fact, I didn't find any- "thing much, because no one seemed to know anything "about it, only was to go to the depot at 11 o'clock to meet "a train. Two or three of the boys told me not to go—to "stay there. I went into Mr. Page's hotel, Mr. Cox's store." (Tr., p. 289.)

The answer of the witness should have been stricken out. It does not appear that he received any information from any of the persons indicted, or the parties to the conspiracy alleged in the first count; that somebody was to go to the depot at 11 o'clock to meet the train, is indefinite and uncertain, and does not show that any of the defendants, or those charged in the indictment, were to meet the train. That "two or three of the boys told me not to go down—to "stay there," is also indefinite and uncertain as to who the

boys were. It does not appear that witness referred to any of the defendants or those charged in the indictment.

XXVI.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Did you "have a statement from any member of the union that "would lead you to believe it—cause you to believe it?" (Tr., p. 290.)

The question called for hearsay testimony. The members of the union referred to were not identified or named, and it does not appear that they were in any way connected with the defendants.

XXVII.

The Court erred in denying defendants' motion and request that a subpoena duces tecum be issued and served upon S. H. Hays, W. E. Borah and J. H. Hawley, requiring them to appear and bring with them books containing the shorthand notes of the testimony of J. M. Porter, M. J. Sinclair, John Clark, Thos. M. Ames, Joseph Phifer, A. M. St. Clair, Jas. B. Pipes and Jos. Kendall, taken at the inquest held upon the bodies of James Cheyne and John Smith in Shoshone County, Idaho. (Tr., pp. 290-294.)

The affidavit of the defendants (Tr., p. 290) shows that at the request of S. H. Hays, Attorney-General of the State of Idaho, and W. E. Borah, J. H. Hawley and J. H. Forney, attorneys representing the State, the District Court of the State of Idaho ordered the package containing the testi-

mony taken at the inquest on the bodies of James Cheyne and John Smith to be sealed, and no one permitted to open it, without an order of the Court; and that a certified copy should not be made, given, or uttered, or issued, by H. M. Davenport, Clerk of said Court; that the testimony should be sealed up so as to conceal the contents of said package, so as to prevent defendants or any of them, or their attorneys or counsellors from inspecting or copying said testimony.

That said Clerk has refused to give a certified copy or to permit the defendants, or any of them, or their attorneys or counsellors, an opportunity to examine the same, or take a copy thereof. That the said testimony is material to the defendants in order to cross-examine, impeach and contradict persons who appeared before the grand jury, who found indictments in this case, and who were expected to be witnesses on the trial.

The defendant being denied process, and the prosecution having refused to produce said testimony, and having joined with the representative of the State of Idaho in denying to the defendants the right to use said testimony for the purposes aforesaid, and from obtaining a certified copy, or any copy of the testimony, the defendants sought to obtain the shorthand notes of the testimony, not for the purpose of offering the notes in evidence, but simply to enable the shorthand reporter to prove by the said notes what was said by the various witnesses on the occasion named. (Tr., p. 316.)

The evidence of the shorthand reporter who took the notes, of course, would not make them competent evidence;

but the shorthand reporter may refresh his recollection from the minutes and then state, when his recollection is refreshed, if he can, what the testimony was.

Wilson *vs.* Com., 54 S. W. Rep., 946, 948.

The attorney for the State of Idaho, Mr. Forney, virtually admitted the purpose of withholding the shorthand notes referred to, and the United States District Attorney joined them in the effort to prevent the defendants from contradicting or impeaching witnesses for the prosecution on the trial of this cause.

Mr. Cozier denied that the notes were in the hands of the prosecution, or that there was anything in the record to show that the notes were under the control of the prosecution, but it was shown that the District Attorney opposed the motion for a subpoena *duces tecum* to bring these papers into Court. (Tr., pp. 316, 317.)

It appears that Mr. Forney was permitted to appear in this cause and oppose the motion of the defendants to obtain possession of said notes for the purposes stated, and that Mr. Cozier joined him in such opposition, which was admitted by Mr. Cozier in the following statement:

"I object to it on the general ground that it would be "incompetent, irrelevant and immaterial—nothing to do "with the prosecution of this case, or any fact connected "with this case." (Tr., p. 320.)

The objection urged by the District Attorney that it was irrelevant and incompetent, and had nothing to do with the

case, is simply to deny the right of cross-examination of the witnesses for the prosecution.

The defendants had the right at the time to apply for compulsory process to secure the notes in question.

The accused is entitled to compulsory process for witnesses even before indictment.

1 Burr Tr., 158, 159.

Chief Justice Marshall said:

"The right of an accused person to the process of the "Court to compel the attendance of witnesses, seems to fol- "low necessarily, from the right to examine those wit- "nesses; and whenever the right exists it would be reason- "able that it should be accompanied by means of rendering "it effectual. * * * The genius and character of our "laws and usages are friendly, not to condemnation, at all "events, but to a fair and impartial trial; and they conse- "quently allow to the accused the right of preparing the "means to secure such a trial. * * * The Constitu- "tion and laws of the United States will now be considered "for the purpose of ascertaining how they bear upon the "question. The sixth amendment to the Constitution "gives to the accused in all criminal prosecutions a right "to a speeedy and public trial, and compulsory process "for obtaining witnesses in his favor. The right given by "this Article must be deemed sacred by the Courts; and "the Article should be so construed as to be something "more than a dead letter."

1 Burr Tr., 158, 159.

XXVIII.

The Court erred in overruling defendants' objection to the question asked the witness Thomas Ames: "Was it not "the talk among the members of the Wardner union that "necessary force would be exerted to drive the non-union "employees out of the camp, or prevent their working in "the Bunker Hill and Sullivan, and was not that the talk "among the members of the Wardner union?" (Tr., p. 259.)

The statement was mere hearsay and not binding upon the defendants. It is not charged in the indictment that any conspiracy existed between the parties referred to and the defendants.

Blanchette *vs.* The Holyoke St. Ry. Co., 55 Northeastern Rep., p. 418.

XXX.

The Court erred in overruling defendants' objection to the question asked the witness Albert Burch: "Mr. Burch, "I desire you to commence with the week preceding the "blowing up of the Bunker Hill and Sullivan mill and re-"late briefly the occurrences so far as the troubles between "the Wardner union and your company are concerned." (Tr., p. 295.)

The action of either the Bunker Hill and Sullivan Mining Company, or the Wardner union, was not binding upon the defendants. It is not shown that either of them were parties to the conspiracy alleged in the first count of the indictment.

Blanchette *vs.* The Holyoke St. Ry. Co., 55 N. E. Rep., 418.

XXXII.

The Court erred in denying defendants' motion to strike out that part of the answer of the witness Albert Burch as to what effect the notice had upon his mind: "Wardner, "Idaho, April 13th, 1899. At a regular meeting of the "Wardner Miners' Union, April 18th, W. F. M., held upon "the above date, it was decided to request all men em- "ployed in and about the Bunker Hill and Sullivan mine "to make application for membership in the Wardner Min- "ers' Union immediately. (Signed) N. A. Flynn, Commit- "teeman. That attracted my attention to the possibility "of there being agitation in progress in the mine." (Tr., p. 296.)

We make the same argument here as under Assignment of Error XXVIII and XXX.

XXXV.

The Court erred in overruling defendants' objection to the statement of the witness Albert Burch as to what he had said to the employees of the Bunker Hill and Sullivan Company. (Tr., pp. 297-298.)

The speech of Burch to the employees of his company was not in any way binding upon any of the defendants. It did not tend to show that there was any conspiracy between the speaker, or any of the parties addressed by him, or connected with the defendants in any way.

XXXVII.

The Court erred in overruling defendants' objection to "the question asked the witness Walter Taylor: "I will "ask you if you had any conversation with Mr. Ed. Boyle, "President of the Wardner Miners' Union, on or about the "26th of April, relative to your going to work, or heard any "statement made by Boyle in regard to you or men going "to work in the Bunker Hill and Sullivan Mine?" (Tr., p. 303.)

The objection should have been sustained for the reason that the conversation between Boyle and the witness was not binding upon the defendants, or competent evidence against them. Boyle was not put upon trial under the indictment. There was no evidence tending to show that Boyle was a party to the conspiracy alleged in the first count of the indictment.

XXXVIII.

The Court erred in overruling the defendants' objection to the question asked the witness I. T. Rouse: "State what "he said, if anything, about the Western Federation of Mi-"ners." (Tr., p. 303.)

This had no tendency to prove the conspiracy alleged, and does not show that the defendants on trial were in any way connected with the matters related by the witness.

XXXIX.

The Court erred in overruling defendants' objection to the question asked the witness F. R. Culbertson: "I will

"ask you if you had any conversation with Mr. Corcoran "on the morning of the 29th of April relative to where he "was going that day, or where the members of the Burke "union were going?" (Tr., pp. 304, 305.)

Mr. Corcoran, although indicted, was not put upon trial in this case. There was no evidence to show that he was in any way concerned in the conspiracy alleged in the first count of the indictment. His statements were not binding upon the defendants; it is not shown that any of the defendants were present. The statement that the witness was informed there was a meeting going on in the Miners' union hall (Tr., p. 150), and the conversation between the witness and Corcoran did not relate to the conspiracy alleged in the first count of the indictment. It related to a strike.

XL.

The Court erred in overruling defendants' objection to the testimony of the witness Emil Anderson that he did not work on April 29th, 1890; that on the morning he was told by some men there would be no work that day, and that there would be a meeting in the union hall; that he did not know who it was informed him, but that he attended the meeting at the hall, and to all testimony of like character. (Tr., p. 304.)

The objection to this testimony should have been sustained. It was incompetent against the defendants and did not tend to prove the conspiracy alleged in the indictment, or that the defendants were in any way connected with it.

XLII.

The Court erred in denying defendants' motion to strike out the portion of the answer of the witness A. M. St. Clair referring to the defendant Malvey: "A. I have been in the "penitentiary, yes. There is where I met Mr. Malvey." (Tr., p. 305.)

The answer of the witness was not responsive to the question and was a voluntary statement. The testimony tended to injure and prejudice the defendant referred to before the jury, upon a matter in no way connected with the charges made in the indictment. This was error.

People *vs.* Vidal, 121 Cal., 221;
People *vs.* Lynch, 122 Cal., 501.

XLIII.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny, for the purpose of contradicting the witness. (Tr., p. 305.)

It was proper cross-examination to show of what offense the witness was convicted. It was not collateral, and the record was proper evidence to prove that his statement upon that material matter was false. It was a material and impeaching question.

Wicks *vs.* Lippman, 13 Nev., 500.

LXIV.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of

the witness A. M. St. Clair for larceny, for the purpose of showing that said witness had given a different name at the time of his conviction than at this time. (Tr., p. 306.)

The argument under assignment of error XLIII is applicable here.

XLV.

The Court erred in sustaining plaintiffs' objection to the defendants' offer to introduce the record of the conviction of the witness St. Clair for larceny, for the purpose of showing the character of the witness. (Tr., p. 307.)

The same argument applies to this assignment.

XLVI.

The Court erred in sustaining plaintiffs' objection to defendants' offer to introduce the record of the conviction of the witness A. M. St. Clair for larceny, for the purpose of impeaching said witness. (Tr., p. 307.)

The defendant had a right to introduce the record for the purpose of impeaching the witness.

Sec. 6082, Rev. Stats. of Id.

XLVIII.

The Court erred in overruling defendants' objection to the question asked the witness St. Clair: "You stated you "were in the penitentiary; state to the jury whether you "were pardoned out." (Tr., p. 308.)

The objection should have been sustained upon the ground that the pardon was in writing, and was the best evidence.

L.

The Court erred in overruling defendants' objection to the question asked the witness G. A. Olmstead: "What "time do you go by there?" (Tr,. p. 309.)

The objection should have been sustained because the question was incompetent and immaterial, and the only time involved was the schedule time fixed by the U. S. Post Office Department.

LI.

The Court erred in denying defendants' motion to strike out the answer of the witness Olmstead: "Well, there was "quite an excitement at Wardner. There was big gangs of "masked men there, armed, and a great deal of excitement. "Blowed up the mill." (Tr., p. 309.)

The motion to strike out the answer of the witness should have been allowed, as the blowing up of the mill did not tend in any way to prove the existence of the conspiracy alleged in the first count of the indictment, or to connect any of the defendants, or any of the persons named in the indictment with the parties who committed the act.

LIV.

The Court erred in overruling defendants' objection to the testimony of the witness Marshall as to the delay of the mail at Wardner. (Tr., pp. 310-317.)

The objection to the testimony of the witness as to the time of the arrival or departure of the train at Wardner should have been sustained for the reason that the law requires a register of the time of arrival and departure of the

mails to be kept, and that register is the best evidence. (Tr., p. 190.) And further, that the transaction related to events occurring on the Oregon Railway and Navigation Co.'s tracks, and had no connection whatever with the conspiracy alleged in the first count of the indictment.

LVIII.

The Court erred in overruling defendants' objection to the question asked the witness Mrs. Tony Tubbs: "What "came under your observation then in regard to the trou- "bles between the union and the Bunker Hill and Sullivan "mine?" (Tr., p. 312.)

The transactions on the 26th of April have nothing at all to do with the crimes alleged in the indictment and do not tend to prove a conspiracy.

LX.

The Court erred in overruling defendants' objection to the answer of the witness J. H. Martin: "He said, when "they got down to Wardner, they detailed about seventy- "five men—throwed them out on the left-hand side, along "a ridge—high piece of ground. Said there was a lot of "men went to the mill, placed dynamite in place." (Tr., p. 313.)

The testimony was irrelevant and immaterial. The defendant Wallace did not state that he participated in any of the transactions. He only related what he had seen other men do. Who those men were was not stated. None of the other defendants were identified, and the testimony had

no tendency to prove the conspiracy alleged in the indictment. (Tr., pp. 225 to 229.)

LXI.

The Court erred in overruling defendants' objection to the question asked the the witness Thomas Wright: "Why "not?" (Tr., pp. 313, 314.)

The witness' reasons for not selling were immaterial and irrelevant. It only gave the witness an opportunity to state something which was prejudicial to the defendant in the way of an opinion or an impression. (Tr., p. 229.)

LXIII.

The Court erred in overruling defendants' motion to strike out all testimony of the witnesses A Burch, Fred Funk, A. M. St. Clair, William McMurtrie, A. S. Crawford, Sophia Moffit, M. J. Sinclair, William Doherty, and James H. Martin. (Tr., pp. 315-316.)

The motion should have been allowed for the reason that the defendants had been unable to cross-examine the witnesses and had been unable to obtain either the testimony of the said witnesses taken at the Coroner's inquest, or the shorthand notes thereof, for the purpose of contradicting and impeaching them, and for the reasons stated under assignment of error No. 6.

The only remedy was by a motion to strike out.

Rapelje's Law of Witnesses, Sec. 245, Subd. 2;
People *vs.* Cole, 2 Lansing, 370;
Pringle *vs.* Pringle, 59 Penn. St., 281;

Stevens *vs.* People, 19 N. Y., 570;
Kissam *vs.* Forest, 25 Wend., 650;
Sperry *vs.* Moore's Estate, 42 Mich., 361;
Hewlett *vs.* Wood, 67 N. Y., 394;
8th Ency. Pl. and Pr., pp. 90 and 100, and notes.

LXIV.

The Court erred in denying the defendants the right to show to the jury by the witness J. H. Forney that the prosecution had withheld evidence which would impeach certain witnesses for the prosecution, and that the prosecution had not acted in good faith toward the defendants. (Tr., pp. 318-319.)

The defendants should have been permitted to show to the jury that the prosecution and persons connected with it, deliberately and willfully withheld evidence which might operate as a shield for witnesses brought against the defendants, and thereby protect such witnesses from contradiction or impeachment. (Tr., pp. 318, 319.)

This was not a matter of law. It was a question of fact whether the prosecution has suppressed or withheld evidence of the character named. It was this fact which the defendants desired to prove, and that being established, it was then a question of law what presumption, if any, it would authorize.

The withholding of evidence favoring a prisoner by the prosecution is severely rebuked in People *vs.* Gordon, 40 Mich., 716.

The evidence referred to, as shown by the affidavits of the defendants, which were not denied by the prosecution, was required for the purpose of impeaching certain witnesses for the prosecution, and the withholding of the same by the prosecution would naturally and fairly raise a presumption that it would be adverse to the prosecution, and would impeach the witnesses named.

Winchell *vs.* Edwards, 57 Ill., 48;
Starkie on Evi., p. 447, Note.

Therefore, a fact which would give rise to such presumption is admissible evidence on the part of the defendants.

LXV.

The Court erred in refusing to allow defendants to show by the witness J. H. Forney that the shorthand notes of the testimony taken before the Coroner of Shoshone County, Idaho, upon the inquest on the bodies of James Cheyne and John Smith were withheld from the defendants, and that witness refused to produce them, and that the United States District Attorney prosecuting this case joined said

Forney in opposition to defendants' request for said short-hand notes. (Tr., p. 320.)

The argument made under assignment of error No. LXIV applies.

LXVI.

The Court erred in sustaining plaintiff's objection to the question asked the witness James B. Pipes, while said witness was testifying in rebuttal: "You remember that very "distinctly—those expressions—and you expect now that "the jury will be excited, do you not?" (Tr., p. 321.)

It was competent to show the motive of the witness and his desire to excite the jury against the defendant, and the question was proper cross-examination. The expressions referred to appear at Transcript 279 and 281.

LXVII.

The Court erred in not striking out all of the testimony concerning the action of the parties engaged in blowing up the Bunker Hill mill, and all declarations and statements of the parties thus engaged, and all testimony concerning the actions and declarations of the members of the various miners' unions concerning their actions and intentions in reference to driving away the employees of the Bunker Hill and Sullivan Mining and Concentrating Company, and all testimony concerning the acts of the miners' unions.

The Court should have allowed the motion to strike out. It had no reference whatever to the conspiracy charged in the indictment, and was wholly immaterial and irrelevant.

LXVIII.

The Court erred in not striking out all the testimony concerning any conspiracy on the part of the members of the various miners' unions to blow up or injure the Bunker Hill mill, or to interfere with the employees of the Bunker Hill and Sullivan Mining and Concentrating Company, or concerning any conspiracy except the conspiracy alleged in the first count of the indictment.

The Court should have granted the motion for the reason stated under assignment of error LXVII.

LXIX.

The Court erred in not striking out all of the evidence concerning the acts, declarations, or statements of any person or persons not shown to be indicted with the defendants or shown to be engaged in the conspiracy alleged in the first count of the indictment.

Plaintiffs in error make the same argument as under assignment of error LXVII.

Blanchette *vs.* The Holyoke St. Ry. Co., 55 N. E. Rep., 481.

LXXI.

The Court erred in refusing to give the jury the following instruction, requested by the defendants, No. IV: "If "the defendants, or any of them, belong to such organiza- "tion or association for unlawful purposes, and that some "of the members as individuals or combined with others, "independent of the organization, to willfully and mali-

" ciously carry out the unlawful purpose as set forth in the " indictment, but that such organization as a whole, or " these defendants as individuals, did not join or partici- " pate in such combination, then such defendant or defend- " ants cannot be held responsible for the acts of such com- " bination or of such individuals."

The instruction was proper in form and substance, and should have been given.

LXII.

The Court erred in refusing to give the jury the following instruction requested by the defendants and numbered V:

"If you find that the defendants, or any of them, did not " combine to obstruct or retard the passage of the United " States mail, as set forth in said first count, then such de- " fendants should be acquitted."

This instruction states the law, as we understand it, and should have been given.

LXXIII.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VI:

"The offense charged in said first count, to wit, obstruct " and retard the passage of the mail as therin set forth, is " an offense exclusively against the United States and cog- " nizable only in the Federal Courts. It is not an offense " against the State of Idaho. The stopping of the railroad " trains and railroad cars is an offense against the State of " Idaho and not an offense against the United States."

This instruction states the law, and should have been given.

Pettibone *vs.* U. S., 148 U. S., 197.

LXXIV.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VII:

"The evil intent in committing the offense against the "State of Idaho is not sufficient to constitute the offense "charged in this indictment. To constitute the offense set "forth in said indictment, the specific intent to violate the "laws of the United States and to commit the crime of will- "fully obstructing and retarding the United States mails, "as set forth in said count, must be found to have existed "in the minds of the defendants in order to justify a con- "viction."

LXXV.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered VIII:

"The meaning of the words 'knowingly' and 'willfully' "is defined as follows:

"'Doing or omitting to do a thing knowingly or willfully "'implies, not only a knowledge of the thing, but a deter- "'mination with a bad intent to do it or omit doing it,' and "to constitute the crime set forth in said first count, it "must be proved, beyond a reasonable doubt, that the act

" of obstructing or retarding the passage of the mail was " done knowingly and willfully by the defendants; that is " to say, that they intended to do it."

LXXVI.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered IX:

"If you find from the evidence that a conspiracy was " formed by a number of persons for the purpose and with " the intent to commit a crime against the State of Idaho, " and that incidentally the United States mail was obstruct- " ed or retarded by said conspirators, but without any know- " ledge and without any intention on the part of said con- " spirators to obstruct or retard the mail, such acts would " not constitute an offense against the United States."

LXXVIII.

The Court erred in refusing to give the jury the following instruction requested by the defendants, numbered XI:

"In order to make one an aider and abetter of conspira- " tors, it is necessary that he should do or say something " showing his consent to the felonious purpose and contrib- " uting to its execution."

LXXIX.

The Court erred in refusing to give the jury the follow-lowing instruction requested by the defendants, numbered XII:

" You are instructed that it makes no difference in this

" case whether the United States mails were obstructed or " retarded. The offense in this case consists in the unlaw- " ful agreement or conspiracy to obstruct or retard. If " there was no agreement or conspiracy to obstruct, then " the defendants are not guilty of the crime charged and " you should acquit them.

" Obstructing and retarding the passage of the United " States mail is a distinct and independent offense from " that of conspiring to obstruct and retard."

Pettibone *vs.* U. S., 148 U. S., 197.

These instructions were all proper and should have been given.

LXXXI.

The Court erred in overruling defendants' motion for a new trial. (Tr., pp. 47, 48.)

The fourth ground of said motion is, "That the verdict " is contrary to law and the evidence in the case."

There was no evidence to prove that the conspiracy alleged in the first count of the indictment was ever entered into by the defendants, or any of them, or by the defendants and any other persons.

The theory of the prosecution was that a conspiracy had been entered into by certain parties to drive away the employees of the Bunker Hill and Sullivan Mining and Concentrating Company, and to blow up its mill. That in the attempt to carry out this conspiracy the conspirators took possession of a railway train carrying the United States

mail, and thus obstructed and retarded the passage of the mails.

The evidence shows that the car in which the mail was carried was not marked or designated in any way, and that there was nothing to indicate in any way that it carried the United States mail. (Tr., p. 209.) There was no evidence to show that the conspirators named knowingly or willfully obstructed or retarded the passage of the mail, and no evidence to show that they had any reason to believe that the train did carry the mail.

If the conspiracy referred to in the evidence was proved, we may concede, for the sake of argument, that defendants might have been convicted under the second and third counts of the indictment, if it had been proved that they knowingly and willfully obstructed and retarded the passage of the mail, as that was an essential element of the crimes charged in those counts; but, under the first count, the conspiracy must be proved as alleged in the indictment. It is not sufficient to allege some other conspiracy and then show that the overt act was committed in pursuance of that other conspiracy.

U. S. *vs.* Goldberg, 7 Bissell, 175;
Evans *vs.* People, 91 Ill., 384;
4th Lawson's Crim. Def., 524, 526;
State *vs.* Hadley, 54 N. H., 224;
Com. *vs.* Kellogg, 7 Cush., 437;
Com. *vs.* Harley, 48 Mass. (7 Metc.), 506.

It is not sufficient to prove a conspiracy to drive away the employees of the Bunker Hill and Sullivan Company,

or to blow up the mill. If that conspiracy was established it was an offense against the State of Idaho, with which the United States had nothing whatever to do, and the mere fact that the mail was knowingly and willfully retarded would not constitute or prove a conspiracy to attain that object.

Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it.

Felton *vs.* U. S., 96 U. S., 699, 702;
Approved in Potter *vs.* U. S., 155 U. S., 438, 446.

Proof of the former conspiracy would not tend to prove the latter, any more than the latter would tend to establish the existence of the former.

Pettibone *vs.* U. S., 148 U. S., 197, 209;

The conspiracy is the gist of the action and must be proved as laid.

6 Ency. of Law (2d), 834;
Pettibone *vs.* U. S., 148 U. S., 197;
U. S. *vs.* Donan, 11 Blatch., 168;
Newell *vs.* Jenkins, 26 Pa. St., 159;
People *vs.* Richards, 1 Mich., 216;
U. S. *vs.* Nunemaker, 7 Biss., 111;
Evans *vs.* People, 90 Ill., 384;
4 Lawson's Cr. Def., 524, 528.

For the foregoing reasons we respectfully submit that the judgment should be reversed and a new trial ordered.

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No. 600.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

LOUIS SALLA, et al.,

PLAINTIFFS IN ERROR,

VS.

THE UNITED STATES OF AMERICA,

DEFENDANT IN ERROR.

Supplemental Brief of Plaintiffs in Error.

Error to the District Court of the United States for the District of Idaho.

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vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

Plaintiffs in error, by leave of Court, file their supplemental brief, and in addition to the errors assigned in the original brief, specify the following errors, the first of which is set forth in the transcript as Assignment of Error No. III, at page 357, and the second as Assignment of Error No. LXXX, at page 377.

III.

The Court erred in overruling the demurrer to the indictment. (Tr., p. 9.)

LXXX.

The Court erred in overruling defendants' motion for an arrest of judgment. (Tr., p. 49.)

These two assignments of error may be treated together.

The demurrer was general and special. There was a special demurrer to the first count of the indictment, to wit: That the facts stated in said first count do not constitute a public offense. (Tr., p. 11.)

The fifth ground of the motion for arrest of judgment is that the facts stated in said first count do not constitute a public offense. (Tr., p. 51.)

The plaintiffs in error respectfully contend that the facts stated in the first count of the indictment do not constitute an offense against the United States, and that the demurrer should have been sustained, but, having been overruled, the motion for arrest of judgment should have been allowed for the same reason.

The charge made in the indictment is that the defendants conspired "to unlawfully, willfully, maliciously, and knowingly delay, prevent, obstruct, and retard the movement and passage of a certain railway car and train over the lines and tracks of the Northern Pacific Railway Company by the said Northern Pacific Railway Company." * * * * * *

The object and scope of the conspiracy was, according to this allegation, to delay, prevent, obstruct and retard the movement and passage of a *certain railway car and train* over the lines of the Northern Pacific Railway Company.

Such a conspiracy is not an offense against the United States, and therefore the Court had no jurisdiction.

The Courts of the United States have no jurisdiction

over offenses not made punishable by the Constitution, laws or treaties of the United States.

Pettibone *vs.* United States, 148 U. S., 197, 203.

It is not alleged that the conspiracy was formed or that it was the object of said conspiracy to willfully and knowingly obstruct or retard the movement or passage of the mails of the United States, or of any carrier or carriage containing the mails of the United States.

Following the statement above set forth of the object of the conspiracy, there is a recital in the following language: "The said Northern Pacific Railway Company then and there being engaged in the business of a common carrier of the mails of the United States, which said railway car and train were then and there carrying and transporting the mails of the United States." * * *

The recital of such a material fact is insufficient. The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially, or by way of recital.

Pettibone *vs.* United States, 148 U. S., 197, 202.

In United States *vs.* Britton, 108 U. S., 199, it was held, in an indictment for conspiracy under Section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by

one or more of the conspirators in furtherence of the object of the conspiracy.

Pettibone *vs.* United States, 148 U. S., 197, 202-3.

It is neither alleged nor recited in said first count of the indictment that the defendants, or any of them, knew that the Northern Pacific Railway Company was, at the time mentioned, or at any time, engaged in the business of a common carrier of the mails of the United States, or that said railway car and train were then and there carrying and transporting the mails of the United States.

To constitute an offense under Section 3995, R. S. U. S., the parties must have obstructed and retarded the passage of the mails or the carrier thereof, *willfully and knowingly*.

In the absence of such an allegation the indictment is insufficient.

Pettibone *vs.* United States, 148 U. S., 197;
Johnson *vs.* State, 26 Texas, 117;
State *vs.* Carpenter et al., 54 Ver., 551.

Respectfully submitted.

PATRICK REDDY,
J. C. CAMPBELL,
W. H. METSON,
Attorneys for Plaintiffs in Error.

No. 600.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JONH DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA;

Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

Error to the District Court of the United States for the District of Idaho.

R. V. COZIER,
U. S. District Attorney, Counsel for Defendant in Error.

NORTH IDAHO STAR JOB ROOMS, MOSCOW, IDAHO

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JONH DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA;

Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

The statements in the Brief of the Plaintiffs in Error, as to what the evidence in the case shows, is strikingly incomplete and entirely misleading, although we do not say that it is intentionally so.

The undisputed evidence in the case shows: that in

Coeur d'Alene mining district in Shoshone county, Idaho, there are located large silver and lead mines in operation and that these mines are located at various points in said district, namely: Burke, Mace, Gem, Mullan, and Wardner; that the mines of Burke, Mace, Gem and Mullan are situated along Canyon Creek and are known as Canyon Creek mines; that at Wardner is located the mine and milling properties of the Bunker Hill & Sullivan Mining & Concentrating Co.; that Wardner, or Kellogg Junction is on the line of the Oregon Railroad & Navigation Company, twelve miles from Wallace; that the mines at Burke, Mace, Gem and Mullan, or the Canyon Creek mines, so called, are what are known as Union mines, that is, that workers in the mines are members of the organization called the Miners Union, or more properly, are members of the organization called the Western Federation of Miners; that at these different mines are local Unions, all a part of the general organization that the Bunker Hill & Sullivan mine at Wardner was, on the 29th of April, 1899, what is known as a non-Union mine; that the Miners Union had made certain demands upon the Bunker Hill Company in the matter of employing Union men and the payment of a certain fixed scale of wages; that such demands had been refused by the Bunker Hill Company; that the Bunker Hill Company

employed non-Union men in working its mine and mill; that the various Unions, or members of the various Unions in the Coeur d'Alenes, had declared a boycott on the mine and mill of the Bunker Hill Company and that force had been resorted to and further threats made upon the part of the members of the Union to drive from their employment the non-Union men who were working for the said Bunker Hill Company; that on the 29th of April, 1899, all the Union mines in the Coeur d'Alene country ceased work; that a Northern Pacific Railway train ran from Wallace to Burke and return each day; that it was a regular train, regularly carrying the United States mail; that on the said 29th of April, 1899, this said train regularly proceeded from Wallace to Burke; that at Burke a large number of men, members of the Miners Union, boarded the train.

That as soon as the train left Burke on its return to Wallace, armed and masked men took possession of it; that the train was met at Mace, Gem, and other points which were located on the line of the Northern Pacific Railway Co., by large bodies of armed and masked men who boarded the train; that the train was stopped at a point above Mace, at the Frisco powderhouse, and took therefrom large quantities of powder; that the engineer of the train was compelled by armed men in charge of the train, after it had reached Gem,

to go again back up to the Frisco powder-house where more powder was placed aboard; that the train then proceeded down toward Wallace; that at a point about one half mile above Wallace the train was met by from two to three hundred Union miners who were employed in the mines at Mullan, six miles distant, but who had ceased work that day; that a large number of this body was armed and masked; that they boarded the train; that the engineer, acting under orders of the armed and masked men in charge, proceeded to run on to Kellogg station over the lines and tracks of the Oregon Railway & Navigation Company, a distance of twelve miles; that before the train reached Kellogg station it was stopped at various points to take aboard from two to three hundred men bearing arms and wearing masks; that these bodies of men who were waiting for this train above Kellogg station, belonged to the Miners' Union, at least largely so; that this train was an irregular train running over a foreign track and that there was no regular train due there at that time, and was entirely out of time; that by the time the train reached Kellogg station it had on board some one thousand men, several hundred of whom were armed and masked; that when the train reached the station, these men, with military precision, under orders, proceeded to the mill of the Bunker Hill Company, which

they destroyed with dynamite; that as soon as this was done the men from the various places in Canyon Creek, boarded the stolen train and proceeded back to Wallace where they dispersed; that the train seized by this body of armed and masked men was a regular train carrying the United States mail; that it was delayed, retarded and obstructed, and that the train was regularly transporting said mail when it was so seized, obstructed and delayed.

A conspiracy to commit a misdemeanor or a felony is a misdemeanor:

Bishop Crim. Law, 7 Ed. Vol. 2, 240.

Am. and Eng. Enc. of Law, 1 Add. Vol. 4, 591.

1 Greenl. Evidence, Vel. 3, Sec. 90.

Thomas v. People, 113, Ill., 531.

So a conspiracy under Section 5440 R. S. U. S., not being declared a felony by statute, is a misdemeanor:

Berkowitz v. U. S., 93 Fed. Rep. 452.

U. S. v. Gardner, 42 Fed. Rep. 829.

Section 1024 R. S. U. S. which provides that "when there are several charges against any person for the same act or transaction, or for two or more acts or

transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts," etc., leaves the question to the court to determine whether in a given case a joinder of two or more offenses in one indictment against the same person is consistent with the settled principles of common law:

Pointer v. U. S. 151 U. S., 396.

U. S. v. Jones, 69 Fed. Rep. 973.

By the practice everywhere, distinct transactions in a misdemeanor may be joined in seperate counts in one indictment:

U. S. v. O'Callahan, 6 McLean, 596.

U. S. v. Devlin, 6 Blatch., 71.

Am. and Eng. Enc. Law, Vol. 4, 756.

State v. Kibby, 7 Missouri, 317.

1 Chitty Crim. Law, Sec. 254.

Kreer v. People, 78 Ill., 294.

Bish. on Crim. Pro. 3 Ed. Vol. 1, Sec. 452.

Counts charging a conspiracy to commit a misdemeanor may be joined with a count charging a misdemeanor:

Wharton Crim. Law, 9 Ed., 1387.

Thomas v. People, 113 Ill., 531.

The fact that the punishments for the different offenses set out in the different counts in the indictment are different, is immaterial:

U. S. v. Jones, 69 Fed. Rep., 971.

Exparte Hibbs, 26 Fed. Rep., 421.

Bish. Crim. Pro., 3 Ed., Vol. 1, Sec. 453.

United States v. Cadwallader, 59 Fed. 677.

The motion to compel the prosecution to elect upon which count it will proceed, is addressed to the sound discretion of the trial court and its action thereon will not be interferred with unless the discretion has been used to the manifest injury of the defendents:

Enc. Plead and Pract., Vol. 10, 551.

Wharton's Crim. Plead. and Pract. 9 Ed. Sec. 295.

In this connection Bishop in his work on Criminal Procedure (Vol. I, Sec. 458) says:

"In the famous Tweed's case, the right of such joinder was almost denied; the court deeming it unjust to require a man to answer to more than one offence—which, however, may be set out in different forms in more counts than one—on a single trial. But the doctrine of the English and most American courts is the direct reverese of this; namely, that, if a man has been engaged in a course of unlawful conduct resulting in a hundred legally distinct, petty

offences, and the executive officers of the government have determined to exercise their right, not controllable by the judiciary, to bring him to trial for all, it is a piece of sheer oppression to him to compel them to find against him a hundred indictments, and require him to stand trial a hundred times, instead of answering to all at once. Moreover, on broader views, it seems to some, and, the author submits, justly, that the joinder of distinct misdemeanors in one indictment, to be followed by the trial of all at a single hearing before a jury, and the punishment of each offence as prescribed by law, is essential to the administration of justice. So plain is all this, that, by many of the judges, even the authority to compel an election of counts in misdemeanor is denied, while others say that, in practice, it is never done. The just view, however, evidently is, that the authority exists, yet it should be exercised cautiously and only in those special cases wherein otherwise some right or interest will be put in peril."

In this case, at the conclusion of the evidence, and before the commencement by counsel of the argument to the jury, a *nolle prosequi* was entered as to the second and third counts in the indictment, leaving a verdict to be rendered only upon the first count.

The dismissal of the second and third counts re-

moved the grounds, if any there were, of the demurrer and motion to quash, so far as those two counts were concerned.

If there was any misjoinder of counts in the indictment the defect was cured when all counts but one were dismissed.

Where the offense charged in the indictment is a misdemeanor the defendants are allowed but three peremptory challenges:

R. S. U. S., Sec. 819.

The right to summon witnesses for the defense at the expense of the government is left by the statutes to the discretion of the trial court and is not subject to review:

R. S. U. S., Sec. 878.

Crumpton v. U. S. 138 U. S., 361.

Goldsby v. U. S., 160 U. S., 70.

All railways are post roads and authorized to carry mails:

R. S. U. S., Sec. 3964.

Any act or declaration of any of the defendants tending to prove the conspiracy, or the connection of that defendant with it, whether made during the existence of the conspiracy or after its completion, is

admissible against him. The conspiracy having been established prima facie, in the opinion of the trial judge, any act or declaration of any member of the conspiracy, in furtherance of the conspiracy, though he may not be a party defendant, is evidence against all the conspirators on trial. Whether a conspiracy is established prima facie is peculiarly for the consideration of the trial court:

Card v. Stata (Ind.) 9 N. E. Rep., 591.

1 Greenl. Ev. Sec. 111.

But it is not always necessary, in order to render the declaration admissible, that the conspiracy should have been first established prima facie. This cannot well be required, where the proof of the conspiracy depends upon a vast number of isolated and independent facts; and, in any case, where the whole of the evidence introduced on the trial, taken together, shows that such a conspiracy actually exists, the order in which it was introduced will be considered immaterial:

State v. Winner, 17 Kan. 298.

State v. Miller, 10 Pac. Rep. 869.

The conspiracy per se may be established in the first instance by evidence having no relation to the defendants. It may be shown by acts of different

persons, at different times and places, and by any circumstances which tend to prove it. The conspiracy and its objects having been shown, the defendants are not affected by it unless they are connected with it by proof:

State v. Winner, 17 Kan. 305.

3 Greenl. Ev. Sec. 93.

Rex vs Hammond, 2 Esp. 718.

People vs Mather, 4 Wend. 261.

2 Bish. Crim. Proc. Sections 228, 277.

Whart. Crim. Law, Sec. 1398.

Reg. v. Murphy, 8 Car. & P. 310.

Reg. v. Frost, 9 Car. & P. 129.

U. S. v. Cole, 5 McLeaan, 601.

King v. Parsons, 1 W. Bl. 391.

Card v. State, (Ind.) 9 N. E. Rep 591.

State v. McCahill, (Iowa) 30 N. W. Rep. 533 and 33 N. W. Rep. 599.

Reg. vs Bernard, 1 Fost. & F. 240.

Rosc. Crim. Ev. 414.

Rex. v. Stone, 6 Term R. 527.

Railroad Company v. Collins, 56 Ill. 212

Where a case rests upon circumstantial evidence much discretion is left to the trial court and its rulings admitting such evidence will be sustained if the

evidence admitted tends even remotely to establish the ultimate facts.

The facts and declarations of co-conspirators in execution of the conspiracy are evidence against other of their number.

Clune vs. U. S. 159 U. S. 589.

A witness cannot be cross examined as to any fact which is collateral or irrelevant to the issue merely for the purpose of contradicting him by other evidence, if he deny it, thereby to discredit his testimony.

His answer cannot be contradicted by the person who asked the question, but is conclusive against him:

1 Greenl. Ev. Sec. 449.

Whart. on Ev. Sec. 551, 559.

People v. Bell, 53 Calif. 119.

Union Pacific R'y. Co. v. Reese, 57 Fed. Rep. 291.

People v. Stalk, 1 Idaho, 278.

Shafter v. U. S. 87 Fed. Rep. 329.

The United States court has no power or authority to set aside an order made by a State Court which had complete control over the parties and the subject matter of the controversy; to do so would be a direct and positive interference with the right of the State court.

When the State court of Idaho ordered the testimony and evidence, taken before the coroner at the inquest over the bodies of James Cheyne and John Smith, sealed up and placed in the custody of the Clerk of that court, and that no one be permitted to open it without an order of the court, such order was conclusive and final: For the United States court to have issued a subpoena duces tecum to be served upon the custodian of the testimony requiring him to produce such testimony and evidence, would be, in effect, to set aside the said order of the State court. This the United States could not do

If the action of the State court, in making the order was void, or voidable, such action could only have been reviewed by the Supreme Court of Idaho:

Pierre v. Noegue, 101 U. S. 55.

Randall v. Howard 67 U. S. 269.

It is not necessary to give an instruction asked by the defense if such instruction has already been given by the court in its general instructions. A Judge is not bound to adopt the categorical language which counsel choose to put in his mouth. If the case is fairly put to the jury, it is all that can be asked.

Ayers v. Wilson, 137 U. S. 584.

When the substance of a request for an instruction has already been given by the court, the refusal of the court to give it again in different language, is not error:

Grand Trunk R'y. Co. vs. Ives, 144 U. S. 408.

N. Y. L. E. & W. Ry. Co. v. Winter, 143 U. S. 60.

Washington & G. R. Co. v. McDade, 135 U. S. 554

Ormsby v. Webb 134 U. S. 47.

Patrick v. Graham, 132 U. S. 627.

When a particular motive for the conspiracy is alleged in the indictment, it does not matter if the conspirators had additional motives other than the indictment describes. It will be sufficient for the purpose of the indictment if the motive, which it alleges, is proven, although the conspirators may have had additional motives.

The fact that one of the motives of the conspirators in seizing and delaying the train carrying and transporting the mail, was to commit an offense against the state, would be immaterial if it be proven that one of the objects of the conspiracy was to delay and obstruct such train.

United States v. Lancaster, 44 Fed. Rep. 896.

Assignments of error to admission or rejection of evidence, not quoting the particular evidence admitted or rejected, must be disregarded:

Rule 11, Rules of the U. S. Circuit Court of Appeals for the Ninth Circuit.

Respectfully submitted,

R. V. COZIER,

U. S. Attorney, for Defendant in Error.

No. 600

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

LOUIS SALLA, et al.,

PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA,

DEFENDANT IN ERROR.

Argument of Attorneys for Plaintiffs in Error.

Error to the District Court of the United States for the District of Idaho.

PATRICK REDDY,
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THE STAR PRESS—JAS. H. BARRY—SAN FRANCISCO.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

LOUIS SALLA et al.,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

ARGUMENT OF ATTORNEYS FOR PLAINTIFFS IN ERROR.

In pursuance of the order of the Court made and entered on the 11th day of May, 1900, granting leave to respective counsel to file arguments, we respectfully submit the following on behalf of plaintiffs in error:

The first question presented in our Brief (pp. 29 to 34, inclusive) is, did the Court err in denying defendants' motion to quash the indictment?

We have nothing to add to what is there presented, except to reply to the Brief and written argument of counsel for defendant in error upon that point.

Counsel for defendant in error contends that a conspiracy under Section 5440, R. S. U. S., not being declared a felony by Statute, is a misdemeanor, and cites the cases of Berkowitz *vs.* United States, 93 Fed., 452, and United

States *vs.* Gardner, 42 Fed., 829. (Brief of defendant in error, page 5.)

This, if correct, is a very simple test for determining the character of an offense against the United States, but the authorities cited in support of this proposition, we contend, are in conflict with the cases cited in our Brief, namely, Bannon & Mulkey *vs.* United States, 156 U. S. 464, and Reagan *vs.* United States, 157 U. S. 301. In these cases no such test was adopted.

In Bannon & Mulkey *vs.* United States, at page 468, the Court after referring to State statutes defining felony, said that in the absence of such statute the word felony is used to designate an offense formerly punishable by death or by forfeiture of the lands or goods of the offender.

In Reagan *vs.* United States, at page 303, the Court, referring to the common law definition of the word felony, and of the Statutes of some of the States, said: "These mat-" ters have thrown about the meaning of the word, as ordin-" arily used, no little uncertainty," from which it is evident that the distinction between felony and misdemeanor is not determined by the simple fact that the Statute of the United States is silent upon the subject.

Again, at page 303 it is said: "There is no statutory de-" finition of felonies in the legislation of the United States. " We must, therefore, look elsewhere for the meaning of the " term."

On the same page the Court says: "The same question " was recently before us in Bannon & Mulkey *vs.* United " States, 156 U. S., 464, 468, and Mr. Justice Brown, deliv-" ering the opinion of the Court, after referring to the

" statutory provisions in some of the States, said: 'But in " the absence of such Statute the word is used to designate " such serious offenses as were formerly punishable by " death, or by forfeiture of the lands or goods of the of- " fender.' "

It is contended by opposing counsel in his argument, at page 4, that "The Statute referred to in the above case by " Justice Brown is a Federal Statute and not a State " Statute."

We do not see how this contention can be maintained, in view of the fact that the Supreme Court of the United States declares in express terms that "Mr. Justice " Brown" * * * 'after referring to the statutory pro- " visions in some of the States, said: 'But in the absence " of such Statute the word is used to designate such serious " offenses as were formerly punishable by death, or by for- " feiture of the lands or goods of the offender.' "

We do not contend, as stated by opposing counsel in his argument at pages 3 and 4, that because an offense is infamous that it is therefore a felony, but because it is declared to be a felony by the laws of the State.

In Reagan *vs.* United States, at page 302, the Court said: "It may be conceded that the present common un- " derstanding of the word departs largely from the techni- " cal meaning it had at the old common law." The Court then goes on to state the cause and reasons for this departure in the following language: "This departure is " owing to the fact that the punishments other than death, " to wit, forfeiture of the lands or goods of the offender, " which formerly constituted the test of a felony, are no

"longer inflicted, at least in this country, and to the "further fact that in many of the States offenses are by "Statute divided into two classes, felonies and misde- "meanors, the former including all offenses punishable by "death or imprisonment in the penitentiary, and the latter "those punishable only by fine or imprisonment in a "county jail, and in other States in which no statutory "classification is prescribed, many offenses punishable by "imprisonment in a penitentiary are in terms declared "to be felonies. These matters have thrown about the "meaning of the word as ordinarily used no little uncer- "tainty."

The Court then points out the influence and facts which brought about the departure from the common understanding of the word felony as used in the old common law, and quotes from Webster's Dictionary to show the uncertainty which now surrounds the meaning of the term, and declares that there is no statutory definition of the word felony in the legislation of the United States, and that therefore the meaning of the term cannot be ascertained from that source. It then cites the opinion of Mr. Justice Brown in Bannon & Mulkey *vs.* United States in which he referred to the statutory provisions in some of the States. Why was such reference made to those Statutes if they did not afford some light upon the question of the meaning of the word felony? That was the question under consideration.

Proceeding, it is said: "But in the absence of such "Statute the word is used to designate such serious of-

" fenses as were formerly punishable by death, or by forfei-
" ture of the lands or goods of the offender."

It was only in the absence of such Statute that it became necessary to determine the character of the offense by the means last referred to.

In the case of Berkowitz *vs.* United States, 93 Fed, 452, the case of Reagan *vs.* United States, 157 U. S., 301, wherein the case of Bannon & Mulkey was commented upon and explained, was not cited by the Court.

II.

The second question presented in our Brief (pages 34 to 37 inclusive) is, did the Court err in denying defendants' motion to require the prosecution to elect upon which count of the indictment it would proceed?

The law upon this subject is clearly stated in McElroy *vs.* United States, 164 U. S., 76, 80, in which Section 1024, R. S. U. S. is considered and its meaning determined.

We have already shown in our Brief that the indictment charges separate and distinct offenses in the several counts. The Court has no discretionary power or authority to consolidate indictments or to allow counts to be joined in one indictment, unless authorized by Section 1024, R. S. U. S.

The affidavit of the defendant, O'Rourke, shows that his witnesses were expected to prove that he was at his home in Wardner and had nothing to do with the alleged stoppage of the trains mentioned in the second and third counts, and all the evidence in the case in relation to him was upon that question. On the trial no evidence was offered to show any

participation on his part in any of the transactions between Burke and Wallace, and all the evidence shows that if there was a conspiracy to obstruct or retard the mail it was completed and fully executed when the train from Burke reached Wallace on the morning of the 29th of April, 1899. All the evidence, both on the part of the prosecution and defense shows that he was in the vicinity of Wardner.

The conspiracy and the acts done under it were completed when the train from Burke reached Wallace. Thomas Chester, the only witness who testified upon this point stated (Tr., p. 179): "The mail was on board in the "morning coming from Burke to Wallace. It was in the "baggage car in my charge. I took it off at Gem and put on "the Gem mail and took it off at Wallace; took off the "Burke mail at Wallace."

No mail was carried on the train from Wallace to Wardner on the down trip and no mail was carried from Wardner to Wallace on the return trip.

The first count of the indictment charges but one offense, if any, namely, a conspiracy to commit an offense against the United States by obstructing and retarding the movement and passage of a certain railway car and train over the lines and tracks of the Northern Pacific Railway Company, etc. Wallace is the western terminus of that branch of the Northern Pacific Railroad. (Tr., p. 176.) The train referred to in proceeding from Wallace to Wardner passed over the lines of the Oregon Railway & Navigation Company. (Tr., p. 176.) The theory of the prosecution was that the defendant O'Rourke and all the defendants, with the exception of Malvey and Wallace, obstructed the train,

if at all, at Wardner. It is not contended that they were at Wallace, or at any point between Wallace and Burke, when the train was obstructed and they could not have been parties to the conspiracy alleged in the indictment, for the reason as above stated, that the object of that conspiracy was effected and completed and the entire transaction closed when the train reached Wallace. In the second count of the indictment it is alleged that the defendants actually obstructed the passage of the mails of the United States by stopping and delaying a certain car and train containing the mails of the United States, which railway car and train was then and there being run and transported over the railway lines and tracks of the Northern Pacific Railway Company. The allegation as to the place where the offense was committed is material, because descriptive of the offense. The lines and tracks of the Northern Pacific Railway Company, as above stated, do not extend beyond Wallace, and there is no evidence to show that any of the defendants, except Malvey and Wallace, were at Wallace or at any point between Wallace and Burke at the time in question. The great mass of evidence concerning the transactions at Wardner Junction and immediate vicinity had no bearing whatever upon either the first or second counts. In the third count the defendants are charged with obstructing and retarding the passage of the mails of the United States by stopping and sidetracking a certain railway car and train then being run and transported over the lines and tracks of the Oregon Railway & Navigation Company by the said Oregon Railway & Navigation

Company. The prosecution by refusing to elect simply used the third count to secure the admission of evidence of a character highly prejudicial to the defendants, for instance, the blowing up of the Bunker Hill & Sullivan Mill, the killing of Cheyne and Smith, and the testimony of the witness Pipes (Tr., p. 279), that he heard exclamations as the mill was blown up of "Down with America," and "To " Hell with America," all of which was calculated to excite and prejudice the jury to the highest degree. That evidence did not tend to prove the conspiracy alleged in the first count, nor to prove any act to effect the object of said conspiracy. The overt acts under said conspiracy, charged against said defendants, are stated in the first count of the indictment. The overt acts alleged must be proved as laid. The allegation that the defendants to effect the object of the conspiracy stopped the railroad car described, cannot be established by proof that they blew up a quartz mill miles away, or that they committed murder by killing persons in the vicinity of that mill, and who had nothing to do with the railway car, or that the persons engaged in such crimes cried "Down with America," nor could any such evidence be admitted to prove the second count in the indictment.

If the prosecution had elected in the first instance to proceed upon the first count against the defendants, upon what theory or pretense could the evidence referred to have been admitted in support of that count?

All the evidence, both for the prosecution and defense, shows that all of the defendants, with the exception of Malvey and Wallace, were in the vicinity of Wardner on

the 29th of April, 1899, and could not have participated in the acts charged in the first and second counts of the indictment.

The refusal to elect could only serve one purpose, and that was to prejudice the defendants.

Counsel for defendant in error, in his written argument at page 8½ says: "The second and third counts were dis- "missed by the District Attorney upon the close of the "evidence in the case, and before the case was given to the "jury. The Court thereafter instructed the jury that they "were to 'consider only the first count in the indictment "just as if there had never been the other two counts in the "indictment.'" (Tr., p. 24.)

The instruction of the Court did not cure the error or relieve the defendant in the least of the prejudice created by the admission of the evidence under the second and third counts. The jury were told to disregard the second and third counts, but they were not instructed to disregard the evidence which had been admitted in support of those counts, nor were they informed as to what part of all the evidence which had been admitted was applicable to the first count, but were left to consider the entire mass of evidence as applicable and competent to support the first count in the indictment. We do not think it can be successfully denied that evidence was admitted under the second and third counts which was inadmissible in support of the first count and the jury were left to determine whether part or all of the evidence should be considered under that count; all of which we respectfully submit could not fail to confuse the jury and prejudice the defendants.

III.

The Court erred in overruling the demurrer of the defendants' to the indictment. (Tr., p. 9.)

This point is discussed in the Supplemental Brief of plaintiffs in error.

The facts stated in the indictment do not constitute an offense against the United States.

Counsel for defendant in error passes this point with the remark: "We think a reading of the indictment, which counsel contend is defective, will fully establish the correctness of the Trial Court in overruling the demurrer to the indictment, and also in overruling defendants' motion for an arrest of judgment." (Argument of defendant in error, p. 22.)

By reading the indictment it will appear that the object and purpose of the conspiracy is clearly defined and stated in the following language: "* * * did then and there "unlawfully, wickedly and maliciously, confederate and "conspire together to commit an offense against the United "States, that is to say, to unlawfully, willfully, mali-"ciously, and knowingly delay, prevent, obstruct, and re-"tard the movement and passage of a certain railway car "and train over the lines and tracks of the Northern Paci-"fic Railway Company by the said Northern Pacific Rail-"way Company." (Tr., p. 2.)

This is all that is charged in the indictment with reference to the object and purpose of the conspiracy. The recital which follows does not enlarge the scope of the conspiracy or affect it in any way.

The recital is as follows: "The said Northern Pacific "Railway Company then and there being engaged in the "business of a common carrier of the mails of the United "States, which said railway car and train were then and "there carrying and transporting the mails of the United "States," without any averment or charge that the defendants were cognizant or knew of such facts.

This is not equivalent to averring that the object of the conspiracy was to willfully and knowingly obstruct and retard the passage of the mails of the United States, or a carrier thereof.

To constitute a good indictment under Section 5440 R. S. U. S., it must be alleged that the conspiracy was to do some act made a crime by the laws of the United States, and it must state with reasonable certainty what the acts intended to be effected and carried out by the agreement of the parties were, so that it can be seen that the object of the conspiracy was to commit a crime against the United States.

A statement of the object of the conspiracy is a requisite of the indictment.

In re Wolf, 27 Fed., 611.

It is not sufficient to allege in the language of the Statute a conspiracy to commit an offense against the United States. It must go further and describe the offense intended to be committed. If it was intended by the prosecution to state an offense under Section 3995, all of the elements of that offense should be alleged.

Section 3995, R. S. U. S., reads as follows: "Any person "who shall knowingly and willfully obstruct or retard the "passage of the mail, or any carriage, horse, driver, or car- "rier carrying the same, shall, for every such offense, be "punishable by a fine of not more than one hundred "dollars."

To constitute a sufficient indictment under Sections 5440 and 3995 it should be alleged that the defendants conspired and agreed to commit an offense against the United States, to wit, knowingly and willfully to obstruct and retard the passage of the mails of the United States.

U. S. *vs.* Debs, 65 Fed., 210.

Scienter is an essential ingredient of the offense described in Section 3995, R. S. U. S.

It is not alleged that the defendants knew that the Northern Pacific Railway Company was engaged in the business of a common carrier of the United States mails. It is simply averred that "said Northern Pacific Railway "Company then and there being engaged in the business of "a common carrier of the mails of the United States, which "said railway car and train were then and there carrying "and transporting," etc.

In Johnson *vs.* State, 26 Tex., 117, it is held that an indictment for an assault on a person named, then and there being an officer in the lawful discharge of his duty, is insufficient as a charge of aggravated assault, because failing to show that it was known or declared to the defendant that the person assaulted was an officer discharging his official duties.

Upon this question there is a full review of the authorities in the case of Pettibone *vs.* U. S., 148, U. S., 197.

The conspiracy must be set out in such manner as to show that it is within the terms of the Statute.

4 Ency. of Pl. and Pr., p. 713, and cases cited in Note 4.

Obstructing and retarding the passage of the mails of the United States is not an offense unless it was done knowingly and willfully.

"The Statute of Congress by its terms applies only to "persons who 'knowingly and willfully' obstruct or retard "the passage of the mail, or of its carrier; that is, to those "who know that the acts performed will have that effect, "and perform them with the intention that such shall be "their operation."

U. S. *vs.* Kirby, 7 Wall., 485-6.

Knowledge is an essential ingredient of the offense described in Section 3995 R. S. U. S., and should be directly, accurately, clearly and positively alleged and not left to inference.

U. S. *vs.* Cruikshank, 92 U. S., 542, at pages 556-7.

In United States *vs.* Claypool, 14 Fed., 127, the indictment charges the defendant with knowingly and willfully obstructing and retarding the passage of the mails. The Court said: "The offense here denounced is the knowing "and willful obstructing of the passage of the mail. I have "already spoken of the meaning of the terms 'knowingly

"and willfully,' and add by way of further explanation "that they are used in contradistinction to innocent, ig- "norant, or unintentional; so that the defendant, Clay- "pool, by the acts he did, may have obstructed and retard- "ed the mail in its passage, yet he is not guilty under the "law if he did it innocently and without intending to do "so."

In U. S. *vs.* Woodward, 44 Fed., 592, the defendant was on trial for knowingly and willfully obstructing and retarding the passage of the mail * * * The Court instructed the jury that in order to convict the defendant they must believe from the testimony that he knew that his acts on that occasion would have that effect, and that he performed them with the intention that such would be their operation.

See also Meiveilles *vs.* Banning, 2 B. & A. D., 909.

The question presented here is one of pleading, and the rule is well settled that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication.

Pettibone *vs.* U. S., 148 U. S., 202;
Blitz *vs.* U. S., 153 U. S., 308.

Under Section 5440 R. S. U. S., the conspiracy must be sufficiently charged and cannot be aided by an averment of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.

U. S. *vs.* Brittan, 108 U. S., 199.

Under Subdivision 5 of the special demurrer to the first count of the indictment it is claimed that the indictment is insufficient, for the reason it does not appear that the said Northern Pacific Railway Company was authorized by law or by the United States to carry the mail of the United States in said car or over the lines or tracks described in said count, or that said Northern Pacific Railway Company was ever authorized by law or by the United States, or otherwise, to carry said United States mails over said lines or tracks, or elsewhere, or that said United States mail was ever delivered to said Northern Pacific Railway Company for carriage from any one place to another or from any one postoffice to another. (Tr., pp. 11, 12.)

The averment that the Northern Pacific Railway Company was engaged in the business of a common carrier of the mails of the United States does not show any authority on the part of said company to carry the mails of the United States.

There is no such business or calling as that of a common carrier of the mails of the United States. Common carriers are such as carry goods for hire indifferently for all persons.

Bouvier's Law Dictionary, Vol. 1, Title, Common Carriers, page 299.

A carrier for one person alone is not a common carrier, and the mails of the United States can only be carried for one party, to wit, the Government of the United States.

In the case of United States *vs.* Porter, 3 Day's Reports, 283, at page 286, it is said, "Edwards, J., was of opinion "that no prosecution for obstructing the passage of the

" mail could be supported without showing a written con-
" tract with the postmaster general.

" Livingston, J., inclined to think that an indictment
" might be framed so as to subject the defendant, without
" proof of a written contract. Yet as this indictment states
" a contract, which is not impertinent or foreign to the
" cause, he was clearly of opinion that it ought to be proved.
" The Court will be more strict, he added, in requiring
" proof of the matters alleged in a criminal than in a civil
" case. Livingston, J., instructed the jury to acquit."

Whether the said company was carrying the mails under the sanction of the postal authorities was a material question.

United States *vs.* Cassidy, 67 Fed., 780.

Authority for carrying the U. S. mails can only be conferred by contract.

The Postmaster General is authorized to contract for carrying the mail on all post roads as often as he may think proper.

R. S. U. S. Section 3965.

The Postmaster General may make contracts with any railroad company without advertising.

R. S. U. S. Section 3942.

Section 3964, R. S. U. S. declares that all railroads or parts of railroads which are now or hereafter may be in operation are post roads, but the owner of a railroad, because it is a post road, is not authorized to carry mail unless directed so to do by the Postmaster General. The Act of March 3, 1879, 20 Stats. at Large, 358, provides that the Postmaster General shall in all cases prescribe on what

trains and in what manner the mail shall be conveyed. The provisions of law applicable to the transportation of the mails on the Pacific Railroads provide that certain railroad companies shall transport mails for the government whenever required to do so by any department thereof.

U. S. *vs.* Cassidy, 67 Fed., 704.

There is no averment in the indictment that any contract was ever entered into between the Government of the United States and the Northern Pacific Railway Company for carrying the U. S. mails, or that said company was ever ordered, requested or required by the Postmaster General to carry the United States mail.

Not only is there a failure to allege any contract for carrying the mails between the United States and the Northern Pacific Railway Company, but there is a failure to allege or show the existence of any person competent to enter into a contract with the United States for the carrying of the mail, or for any other purpose, or to show the existence of any one competent to act as a carrier of the United States mail. The name "Northern Pacific Railway " Company" does not indicate the existence of a natural or artificial person.

Proprietors of the Mexican Mill Co. *vs.* The Yellow Jacket Silver Min. Co., 4 Nev. 40, Hawley Ed., 553.

There is no allegation that the Northern Pacific Railway Company was a corporation, which is a material fact.

U. S. *vs.* Cassidy, 67 Fed., at p. 780.

The facts stated in the indictment being insufficient to constitute an offense against the United States, the trial

Court had no jurisdiction over the defendants or the subject matter of the action.

Pettibone *et al.* United States, 148 U. S., 197.

IV.

The fourth question presented in our Brief is in reference to the number of peremptory challenges allowed the denfendants. (Tr., p. 357.)

The number of peremptory challenges to which the defendants were entitled depends upon whether the offense charged in the first count of the indictment is a felony, and that point is fully discussed under Point 1, of our Brief.

V.

This point refers to the action of the Court in limiting the number of witnesses requested by the defendants to be subpoenaed at the expense of the Government. (Tr., p. 357.)

We have discussed this question in our Brief at pages 38, 39, and have only to add that the Court improperly exercised its discretion in denying the request of the defendants.

VI.

This point raises the question whether the Court erred in denying the defendant's request for a subpoena *duces tecum* directing H. M. Davenport to appear in Court and bring with him the testimony of certain persons, and is discussed in our Brief at pages 39 to 46 inclusive.

In connection with what is there said we beg leave to submit the following: Each of the defendants moved the Court that a subjoena *duces tecum* be issued and served upon H. M. Davenport, Clerk of the District Court of the First Judicial District of the State of Idaho, commanding him to appear and bring with him certain testimony therein described. The motion was supported by an affidavit on the part of each of the defendants, showing the necessity for the testimony of Mr. Davenport and the documents referred to.

The Court allowed (Tr., pp. 92 to 120) twenty witnesses for the defendants to be subpoenaed at the expense of the government, but refused to allow a subpoena *duces tecum* for Mr. Davenport, thereby denying to the defendants the right to select Mr. Davenport as one of that number. (Tr., pp. 68, 120, 317.)

The Court in its ruling clearly indicated and stated that the defendants were not entitled to the documents specified in the affidavits, namely, the testimony taken at the coroner's inquest, and that the Court had no power to enforce the production of said documents.

At page 319 of the Transcript the following appears: "The Court: We will not have any more of this before the "jury. I see what the object is. It was clearly shown "before here, that this testimony was in the hands of the "State, and that this Court, as I have clearly before "expressed myself, would have had to come in conflict with "the authorities of the State to get that testimony, and it "is not necessary now to place anything more in the "record."

It is true the application was made for process for Mr. Davenport and the documents at the expense of the Government under Section 878, R. S. U. S., but the Court held that the defendants were not entitled to process at all, and that the Court would not compel the witness to attend or enforce the production of the documents in any event, for the reasons stated. Therefore it would have been idle for the defendants to attempt to obtain from friends sufficient means to pay the expenses of serving a process which the Court had already declared it would not enforce.

If the Court had placed its ruling upon the ground that the defendants were not entitled to process at the expense of the government, that would have been a matter within the discretion of the Court, but the ruling of the Court was far more comprehensive than the motion. It went further and decided that it would not issue the subpoena or compel the production of the documents for other reasons stated by the Court.

The facts alleged in the affidavits concerning the contents of the documents in question, and the materiality thereof, were not denied or questioned by the prosecution.

The motion was opposed by the United States attorney on behalf of the plaintiff and J. H. Forney, Esq., on behalf of the State of Idaho. (Tr., p. 68.) No grounds were stated for opposing the motion, and the defendants being anxious to know the reasons of the prosecution for such opposition called J. H. Forney, Esq., who testified: "I was acting "County Attorney for Shoshone county for quite a time, "and think I was appointed about the 29th of May. It was "at the beginning of Court up there. I directed the prose-

"cution of the case that was tried there at Wallace and "directed the action with reference to all State indict- "ments. At the close of the Paul Corcoran case an order "was made by the Court to seal up all the testimony taken "at the inquest on the bodies of Cheyne and Smith, before "the Coroner. That was done upon my motion. Since that "time and during this trial I appeared here to oppose the "granting of an order by this Court for a subjoena *duces* "*tecum* to the clerk of that Court to bring that testimony "here. I appeared here specially for that purpose on the "grounds that this subpoena was directed to the officer in "whose custody this testimony was, in Shoshone County, "and as it would materially interfere with the prosecu- "tions in that county, which are now pending. There are "no cases being tried there, but there was quite a number "of indictments. I think some of these defendants are "indicted also. I opposed it on that ground; the publica- "tion of that testimony would expose the entire line of "prosecution in behalf of the State as to these defendants, "a large majority of whom are not in custody." (Tr., pp. 272, 273.)

It will be seen from this that Mr. Forney claimed to represent the State of Idaho in all the cases referred to and appeared specially in the trial Court to make known the opposition made by the State and the reasons therefor, namely, that the use of the testimony would expose the entire line of the prosecution in behalf of the State. What did the State have to conceal from the defendants? Were not the defendants entitled to know the entire line of the prosecution when it came to the trial of the case and to

have any documents in the possession of the State tending to prove their innocence or impeach witnesses produced against them?

The Court, however, did not base its ruling upon grounds so manifestly unreasonable and unjust. It held that the testimony was in the hands of the State and that it would have to come in conflict with the authorities of the State to obtain the testimony. (Tr. p. 319.)

Counsel for defendant in error, in his argument at p. 11, endeavors to support the ruling of the Court upon the ground that the United States Court has no power or authority to set aside an order made by a State Court which had complete control over the parties and subject matter in controversy; that to do so would be a direct and positive interference with the rights of the State Court.

We quite agree with counsel in this statement of the law, but the question still remains, did the District Court of the State of Idaho in and for Shoshone County have complete control of the parties, or any of them, or the subject matter? The testimony of Mr. Forney shows that at the close of the Paul Corcoran case an order was made by the Court to seal up all the testimony taken at the inquest on the bodies of Cheyne and Smith, and that the order was made upon the motion of Mr. Forney. (Tr., p. 272.) The affidavit of the defendant O'Rourke, and of all the other defendants, shows that at the time said document was filed with the clerk, the District Court of Idaho ordered that said package containing said testimony should be sealed and no one permitted to open it without an order of the Court. There was no order that it should be placed in the

custody of the Court, but simply that it should be sealed up and no one permitted to examine it, or copy it, without an order of the Court.

The order was not made in the trial of any action or proceeding. It was made exparte on motion of Mr. Forney, in the absence of the defendants. There was no action or proceeding pending to which the defendants were parties. There is no law in the State of Idaho authorizing the District Court, or any Court, to seal up any public record or public document. There is no law in Idaho authorizing any Court to seal up or conceal the testimony taken at a coroner's inquest, or in any other judicial proceeding, or to deny any person accused of crime access to any document or public writing, to assist a prosecution, or obstruct a defendant in preparing and presenting his defense.

Evidence which may effect the life, liberty or rights of a human being is not the property of the State of Idaho: it belongs to the cause of right and justice, and the order of the District Court named was absolutely void upon its face, and for that reason the Court below had the right to ignore and disregard it.

In proceedings on habeas corpus where a person is deprived of his liberty under the order of any Court, void on its face, it will be disregarded and the person restrained restored to his freedom.

We think this doctrine is of universal application.

Assignments of error VII. to XLVIII. inclusive we have argued in our Brief, and will not further discuss the questions therein referred to.

VII.

As to Assignment of Error L. which appears in our Brief at page 64, we wish to add to what there appears, that the time of arrival and departure of the mail is to be registered and kept by the postmaster.

R. S. U. S., Section 3841.

Postal Rules and Regulations, page 331, Sections 852, 854.

The witness testified as to railroad time and not the schedule time as fixed by the Postal Department. Whether the passage of the mail was obstructed or retarded is to be determined by schedule and not railroad time, and the register required by law to be kept is the best evidence.

Assignments of Error LI. to LXVI. inclusive we will not further discuss.

Counsel for defendant in error contends in his argument (p. 15) that the rulings of the trial Court on the admission and rejection of evidence were correct, and that no error was committed that would in any way prejudice the rights of the defendants.

In reply to the argument of counsel upon this point we beg leave to call attention first to the allegations in the count of the indictment as to the scope and purpose of the conspiracy, and second, as to the particular place where the offense was intended to be committed.

The allegation in said first count is that the defendants "did then and there unlawfully, wickedly, and maliciously "confederate and conspire together to commit an offense "against the United States, that is to say, to unlawfully,

"willfully, maliciously, and knowingly delay, prevent, "obstruct, and retard the movement and passage of a cer- "tain railway car and train over the lines and tracks of the "Northern Pacific Railway Company * * * "

In this case the place named is matter of essential description. It must be truly alleged and proved as laid.

Bishops New Crim. Proc. Vol. 1, Section 373, subd. 3 and note 4.

In State *vs.* Smith, 5 Harring. (Del.) 490, the Court observed, "Unless time or place enter into the crime itself "it is not material to state or prove it. The locality of a "road enters into the charge of obstructing it."

Evidence of a conspiracy to obstruct and retard the movement and passage of a railroad car over the lines and tracks of the Oregon Railroad and Navigation Company, or any other railway than the one named, would not be competent or admissible in support of this count.

It is also alleged that "to effect the object of the said "conspiracy, the said defendants, on the 29th day of April, "A. D. 1899, * * * did then and there unlawfully, "forcibly, maliciously, and knowingly delay, arrest, "obstruct, and retard the movement and passage of a cer- "tain railway car and train over the lines and tracks of the "Northern Pacific Railway Company, by the said company " * * * ."

These allegations must be proved as laid.

The town of Wallace is the western terminus of that branch of the Northern Pacific Railway, and the line extends northeasterly to the town of Burke, about seven miles distant. (Tr., p. 173.) There is no evidence of any inter-

ference with any car or train on said railroad line except on the morning of the 29th of April, 1899, on the run or trip from Burke to Wallace. Thomas Chester testified that he was in charge of the mail that morning; that he took it off at Gem and put on the Gem mail and took of the Gem and Burke mail at Wallace. (Tr., p. 179.)

This is the only evidence upon this particular point.

Wallace is the eastern terminus of the branch of the Oregon Railroad and Navigation Company in Shoshone County, which extends from Wallace in a westerly direction to Wardner Junction, and beyond. The distance between Wallace and Wardner Junction is about eleven miles. (Tr., p. 183.) When the train from Burke reached Wallace on the morning of the 29th of April, 1899, and after all the United States mail had been removed from the train, a party of armed and masked men compelled the conductor and trainmen to proceed with said train over the track of the O. R. & N. Co., to Wardner Junction, where the train was detained about three hours, (Tr., p. 176) while the armed and masked men proceeded to destroy the Bunker Hill & Sullivan Mill and commit the other crimes described in the evidence, after which they returned to the train and proceeded to Wallace, and there dispersed. (Brief of Defendant in Error, page 5.)

There was no United States mail on the train from the time it left Wallace, until its return, and there is no evidence that any mail was delivered for carriage, or carried, from Wallace to Burke on the afternoon or evening of that day.

The testimony of L. W. Hutton shows that the train did not reach Burke on time that evening, but that the delay was caused by switching at Wallace. (Tr., p. 185.)

There is no evidence that any train carrying United States mail on the railroad mentioned in the first count of the indictment was ever obstructed or retarded, either before or after the 29th of April, 1899, or at any time, except on the run from Burke to Wallace on the morning of that day. Therefore if there was a conspiracy, as alleged, its purpose and object was effected and accomplished when the train from Burke reached Wallace that morning, and the mail delivered at that station.

All of the evidence admitted by the Court as to the acts and declarations of the parties who captured the train at Wallace and who committed the other crimes at Wardner Junction in blowing up the Bunker Hill & Sullivan Mill, etc., was incompetent and inadmissible against any of the parties charged with conspiracy under the first count of the indictment, for the reason that that conspiracy had been completed and the transaction closed before the commission of the acts or the making of the declarations referred to in the evidence; hence said acts and declarations were not within the purpose and scope of the alleged conspiracy. Said acts could not have served to effect the object of the alleged conspiracy, and the acts and declarations of any one of the persons participating in the commission of said crimes or in making such declarations was inadmissible as evidence against any one except the individuals perpetrating the acts or making the declarations.

In the case of Logan *vs.* United States, 144 U. S., 263, it

was held and decided that "upon an indictment for con-
" spiracy the acts and declarations of one conspirator made
" after the conspiracy has ended and not in furtherance of
" the conspiracy are not admissible in evidence against the
" other conspirators."

To the same effect is People *vs.* Irwin, 77 Cal., 494.

The Court erred in the admission of another line of evidence. The testimony of the witnesses Burch, (Tr., p. 137) Ames, (Tr., p. 127) Taylor, (Tr., p. 146) Rouse, (Tr., p. 147) and Sutherland (Tr., p. 149) in relation to occurrences at the Bunker Hill & Sullivan mine and vicinity on the 23rd and 26th of April, 1899, and prior to the 29th day of that month, was incompetent and immaterial for the reason that it was prior to the inception of the conspiracy mentioned in the first count of the indictment, and was incompetent to prove either the conspiracy or to bind any of the alleged conspirators. The indictment charges that the defendants, "and others whose true names are to the " grand jurors unknown, on the 29th day of April, A. D. " 1899, did then and there unlawfully, wickedly and malici-
" ously confederate and conspire together to commit an
" offense against the United States * * *." This allegation fixes the time when the alleged conspiracy was formed, and there is no evidence to contradict that averment, or to show that the conspiracy was formed at any time prior to the day named, and therefore the prosecution was bound by that statement.

We do not contend, nor do we deem it necessary to argue that the United States could not, under that allegation, have adduced evidence to show that it was formed on some

day prior to the 29th of April, but no such evidence was offered and the prosecution is bound by the allegation as to the time when the conspiracy was formed.

As we have heretofore had occasion to say, there was no evidence to prove that the conspiracy alleged in the first count of the indictment was ever entered into by the defendants or any of them, or by the defendants and any other persons. The prosecution proceeded upon the theory that a conspiracy was entered into by certain parties to drive away the employees of the Bunker Hill & Sullivan Mining and Concentrating Company and to blow up its mill, a conspiracy differing entirely from the one charged in the first count of the indictment. The Court instructed the jury upon this line. (Tr., pp. 346-7-8.)

The allegation in the first count of the indictment, we think, established conclusively the time when the conspiracy was formed, consequently the admission of the testimony of the witnesses above referred to, concerning the transactions between the Bunker Hill & Sullivan Mining and Concentrating Company and others, was incompetent and irrelevant, for the reason that the occurrences did not relate in any way to the conspiracy alleged.

Wright on Conspiracy, p. 217;
People *vs.* Irwin, 77 Cal., 494;
Logan *vs.* United States, 144 U. S., 263.

The acts and declarations of the alleged conspirators made before the conspiracy was formed are not admissible to prove the fact of the conspiracy. No declaration of a co-conspirator, except those made during the pendency of the

conspiracy, and in furtherance of its objects, can be used against a co-conspirator.

People *vs.* Irwin, 77 Cal., 494.

"If the acts and declarations of a conspirator with the "accused are made in his absence, they are not admissible "against him to prove either the body of the crime, or the "existence of the alleged conspiracy, unless they either so "accompany the execution of the common criminal intent "as to become part of the *res gestae,* or in themselves tend "to promote the common criminal object. The acts "and declarations of a conspirator to be admissible in evi- "dence to charge his fellows must have been concomitant "with the principal act and so connected with it as to con- "stitute part of the *res gestae.*"

Wright on Conspiracy, p. 217.

Counsel for defendant in error sets forth certain instructions given by the Court to the jury and contends they are correct. At pages 19 and 20 of his argument it is said, "The above instructions were correct and in line with "the authorities. It was not necessary to prove that the "defendants entertained a specific intent to violate Section "3995, R. S. U. S., or that they had such intention in mind "when they conspired to seize, obstruct and delay the pas- "sage of the railway train carrying the mail, as set out in "the indictment," and cites the case of U. S. *vs.* Kirby, 7 Wall., 485.

In that case the defendants were charged not with a

conspiracy, but with knowingly and willfully obstructing and retarding the passage of the mail, and it was there held that the acts described in Section 3995, R. S. U. S., must be knowingly and willfully done, and that the section applies only to those who know that the acts performed will have that effect and perform them with the intention that such shall be their operation. The Court held however, that when the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object.

The same may be said of United States *vs.* Cassidy, 67 Fed., 698, and United States *vs.* Debs, 65 Fed., 211, but none of these cases apply to a charge under Section 5440, R. S. U. S.

We repeat that the point decided in these cases is as to the actual fact of obstructing and retarding the passage of the mail. The gist of this action is the conspiracy, and it makes no difference whether the United States mail was actually obstructed or not. It is only necessary that an act to effect the object of the conspiracy be performed by one or more of the alleged conspirators, and that act need not be criminal.

Wright on Conspiracy, p. 132.

It is contended by counsel for defendant in error in his argument at page 19, "It was not necessary to prove that "the defendants entertained a specific intent to violate "Section 3995, R. S. U. S. * * *" In the case of Pettibone *vs.* United States, 148 U. S. at page 207, a complete

answer to this contention will be found, where the Court said; "It is insisted, however, that the evil intent is to be "found, not in the intent to violate the United States "Statute, but in the intent to commit an unlawful act, in "the doing of which justice was in fact obstructed, and "that, therefore, the intent to proceed in the obstruction of "justice must be supplied by a fiction of law. But the "specific intent to violate the Statute must exist to justify "a conviction, and this being so, the doctrine that there "may be a transfer of intent in regard to crimes flowing "from general malevolence has no applicability."

And again, at page 209: "While offenses exclusively "against the States are exclusively cognizable in the State "Courts, and offenses exclusively against the United "States are exclusively cognizable in the Federal Courts, "it is also settled that the same act or series of acts may "constitute an offense equally against the United States "and the State, subjecting the guilty party to punishment "under the laws of each government. Cross *vs.* North "Carolina, 132 U. S., 131, 139. But here we have two "offenses, in the character of which there is no identity; "and to convict defendants of a conspiracy to obstruct and "impede the due administration of justice in a United "States Court, because they were guilty of a conspiracy to "commit an act unlawful as against the State, the evil "intent presumed to exist in the latter case must be im- "puted to them, although ignorance in fact of the pendency "of the proceedings would have otherwise constituted a "defense, and the intent related to a crime against the "State.

"The power of the United States Court was not invoked "to prohibit or to punish the perpetration of a crime "against the State. The injunction rested on the jurisdic- "tion to restrain the infliction of injury upon the com- "plainant. The criminal character of the interference may "have contributed to strengthen the grounds of the appli- "cation, but could not and did not form its basis.

"The defendants could neither be indicted nor convicted "of a crime against the State, in the Circuit Court, but "their offense against the United States consisted entirely "in the violation of the Statute of the United States by "corruptly, or by threats or force, impeding or obstructing "the due administration of justice. If they were not guilty "of that, they could not be convicted. And neither the "indictment nor the case can be helped out by reference to "the alleged crime against the State, and the defendants "be punished for the latter under the guise of a proceeding "to punish them for an offense which they did not com- "mit.

It might be conceded, for the purposes of the argument, that if the conspiracy against the Bunker Hill & Sullivan Mining and Concentrating Company was established, and that in carrying out the conspiracy the conspirators knowingly and willfully obstructed the passage of the United States mails, or a carrier thereof, that they might be prosecuted and convicted under Section 3995, R. S. U. S.; not for conspiracy, because that was an offense against the State, but for the actual interference with the mail of the United States under the section last named, but that of-

fense is an entirely different and distinct offense from that charged in the indictment.

Proof of a conspiracy to commit an offense against the State cannot establish another and distinct conspiracy, namely, one to commit an offense against the United States.

The object of the conspiracy must be proved as laid in the indictment.

Evans *vs.* People, 90 Ill., 384;
4 Lawson's Cr. Def., 524, 528.

The conspiracy itself must be proved, as alleged, by clear and satisfactory evidence. Accused must be guilty of the offense as charged, or conviction cannot be sustained.

Id., 530.

Opposing counsel maintains that his contention is supported by the case of In re Coy, 127 U. S., 731. That case was reviewed in Pettibone *vs.* United States at pages 208-209, and later in the case of Blitz *vs.* United States, 153 U. S., 308.

In that case Mr. Justice Harlan delivered the opinion of the Court, and at page 314, after referring to In re Coy, 127 U. S., 731, 754, 755, said; " It is not to be inferred from the " decision in that case that Section 5511 is applicable to " any act or omission of duty upon the part of an officer of " election, or of a voter or other person, except such act or " omission of duty as affected or might affect the integrity " of the election for a Representative in Congress. The con- " spiracy charged in that case did imperil the integrity of

" the vote for Representative in Congress, because the re-
" turns of the election related to Representatives in Con-
" gress as well as to State officers, and were liable to be
" falsified if they passed, before certificates of election were
" issued, into the hands of unauthorized persons. But this
" reasoning has no opplication to the present case. Voting,
" in the name of another, for a State officer, cannot possibly
" affect the integrity of an election for Representative in
" Congress. With frauds of that character the national
" government has no concern, and, therefore, an indictment
" under Rev. St. Section 5511 for knowingly personating
" and voting under the name of another, should clearly
" show that the accused actually voted for a Representative
" in Congress, and not simply that in voting he falsely per-
" sonated another at a general election at which such
" Representative was or could have been chosen. In cases
" like the present one, it should not be left in doubt, or to
" mere inference, from the words of the indictment,
" whether the offense charged was one within Federal cog-
" nizance."

This decision is in harmony with the case of Pettibone *vs.* United States, supra.

In the dissenting opinion of Mr. Justice Brewer in the Pettibone case, at page 213, In re Coy is referred to. and it is said; " Mr. Justice Field alone dissented from the opin-
" ion in that case, holding that, as it is insisted here, there
" should be a specific charge of a conspiracy to do some-
" thing affecting the election of the Federal officer. I quote
" this from his opinion; 'The indictment in this case
" 'charges a conspiracy to induce certain election officers

" 'appointed under the laws of Indiana to commit a crime
" 'against the United States, the crime being the alleged
" 'omission by them to perform certain duties imposed by
" 'the laws of that State respecting elections. But it con-
" 'tains no allegation that the alleged conspiracy was to
" 'affect the election of a member of Congress, which, as
" 'said above, appears to me to be essential to bring the
" 'offense within the jurisdiction of the Court. If the con-
" 'spiracy was to affect the election of a State officer, no
" 'offense was committed cognizable in the District Court
" 'of the United States. If it had any other object than to
" 'affect the election of a member of Congress, it was a
" 'matter exclusively for the cognizance of the State
" 'Courts.' It seems to me that in this opinion the Court
" endorses the views expressed by Mr. Justice Field in that
" dissent, and then repudiated by a majority of the Court."

Not only did the Court adopt the reasoning of the dissenting opinion of Mr. Justice Field in the case of In re Coy, but in the later decision in the case of Blitz *vs.* United States, supra, the Court, without any dissenting opinion, also adopted the reasoning of the dissenting opinion of Mr. Justice Field.

Counsel for defendant in error in his argument at page 16 says that the Court did not err in sustaining plaintiff's objection to defendant's offer to introduce the record of the conviction of the witness A. M. St. Clair, for the purpose of impeaching the witness, on the ground that it was not proper cross-examination, and collateral and irrelevant.

In the case of People *vs.* Chin Mook Sow, 51 Cal., 597, it was held that a witness, on cross-examination, may be

asked if he has not been convicted of a felony, and the party asking the question may also introduce the record of his conviction; and in the same case it was held that a matter is not collateral where the party asking the question would have the right to prove it as an independent fact. Under the common law rule a party could only prove a conviction by the record.

Opposing counsel contends that the question as to whether the verdict is contrary to the evidence is one which cannot be considered by the Appellate Court if there is any evidence proper to go to the jury in support of the verdict, and cites Crumpton *vs.* United States, 138 U. S., 361. (Argument of counsel for Defendant in Error p. 21.)

We contend that there was no evidence proper to go to the jury in support of the verdict. There was no evidence at all to support the charge of conspiracy alleged in the first count of the indictment, and we do not understand that opposing counsel claims there was any evidence to support the first count, unless evidence of the other conspiracy is sufficient to support it.

In conclusion, we respectfully submit that the defendants did not have a fair and impartial trial under the law, and that the trial Court had no jurisdiction over the defendants or the subject matter of the action.

PATRICK REDDY,
J. C. CAMPBELL,
W. H. METSON,
Attorneys for Plaintiffs in Error.

No. 626

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

E. C. EVANS,

Appellant,

vs.

THE COLLECTOR OF CUSTOMS OF THE PORT OF SAN FRANCISCO,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the Circuit Court of the United States for the Ninth Circuit, in and for the Northern District of California.

FILMER-ROLLINS CO. PRINT., 424 SANSOME ST., S. F.

INDEX.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal.

Petition for Review.

To the Honorable Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California:

The petition and application of E. C. Evans respectfully represents and shows to this Honorable Court that on the 4th day of August, 1897, your petitioner imported from Tonquin, in China, into the port of San Francisco, in the ship "Kambira," certain merchandise, to wit, 1711.1902 tons of anthracite coal, which said merchandise is more fully described in an entry for consumption made thereon in the office of the Collector of Customs at said port of San Francisco on or about the 19th day of August, 1897, and numbered 10,063 of the official serial numbers of the custom-house at said port.

That upon the entry of said merchandise the collector of said port of San Francisco classified said merchandise as "Coal containing less than 92 per cent of fixed carbon"

under the act of Congress of July 24th, 1897, entitled "An act to provide revenue for the Government and to encourage the industries of the United States."

That thereafter, on the 15th day of September, 1897, said entry was liquidated by said collector upon such classification at the rate of duty of sixty-seven cents per ton, and said duty at said rate upon such merchandise, amounting to the sum of twelve hundred and seventy and 0-100 dollars, was ascertained, levied and liquidated by said collector, and that the said amount so ascertained, levied and liquidated by said collector, together with all charges ascertained to be due upon said merchandise, was thereupon paid by your petitioner to said collector. That within ten days after such ascertainment, liquidation and payment of said duty, to wit, on the 21st day of September, 1897, your petitioner being dissatisfied with said classification, ascertainment and liquidation of said entry, gave notice in writing to said Collector of Customs of his such dissatisfaction, which written notice and protest are numbered 41,600 B-4248, and distinctly and specifically set forth the reasons and grounds of and for your petitioner's objections thereto, in language as follows, to wit: "The grounds of our objections are that said importation is anthracite coal and so known to the trade commercially, being invoiced, manifested, bought, sold and trafficked in only as anthracite coal, and is entitled to free entry as specially provided for by name under paragraph 523 in the free list of the act of July 24th, 1897, as coal, anthracite, not specially provided for by name elsewhere in said act."

That thereafter, in due and proper time, said Collector of Customs transmitted all papers and exhibits on which said entry and liquidation and exaction of duty was made, including the invoice and all the papers and exhibits connected therewith, to the Board of United States General Appraisers at New York, State of New York, United States of America, and that thereafter, to wit, on October 24th, 1899, said Board of United States General Appraisers made its decision in said matter in favor of said classification, ascertainment and decision so made by said Collector of Customs and overruling said protest and objections thereto.

That your petitioner avers that he is dissatisfied with the said assessment and liquidation and exaction of duty so made by said collector, and dissatisfied with said decision of said Board of United States General Appraisers as to the construction of the law respecting the classification of said merchandise and the duty imposed thereon under such classification.

Wherefore, your petitioner appeals to this Honorable Court, and prays and applies for a review of the questions of law and fact involved in said decision of the said Board of United States General Appraisers in respect to said entry and said payment of duties, and your petitioner specifies as the reasons for his objections to said decision the following errors of law committed by said Board of United States General Appraisers in said decision and which are complained of by your petitioner, to wit:

First.—Error of law in holding and deciding that the coal covered by and described in said entry was properly

classified as "Coal containing less than 92 per cent of fixed carbon" under paragraph 415 of said act.

Second.—Error of law in not holding and deciding that said coal affected by and described in said entry should have been classified as anthracite not specially provided for in said act.

Third.—Error of law in holding and deciding that although the coal affected by and described in said entry was anthracite coal, yet, because it contained less than 92 per cent of fixed carbon, it was subject to duty under paragraph 415 of said act.

Fourth.—Error of law in holding and deciding that anthracite coal containing less than 92 per cent of fixed carbon is specially provided for under paragraph 415 of said act.

Fifth.—Error of law in holding and deciding that anthracite coal containing less than 92 per cent of fixed carbon is not entitled to free entry under paragraph 523 of said act.

And your petitioner prays this Honorable Court for an order requiring said Board of United States General Appraisers to return and transmit to this Cout the record and the evidence taken by them in the matter of their said decision, with a certified statement of the facts involved in said case and their decision thereon, and that upon such record and evidence and such further evidence as may be taken herein this Honorable Court will proceed to hear and determine the questions of law and fact involved in said decision respecting the classification of said merchandise and the duty chargeable thereon under said classification, and that upon such deter-

mination said decision of said Board of United States General Appraisers be reversed and set aside, and that it be adjudged that said merchandise should be admitted free of duty, and that your petitioner may recover and may have judgment for the full sum of duty levied, liquidated and paid to said collector upon said merchandise as aforesaid with interest and costs, and that this Honorable Court afford such other and further relief to petitioner as may be right and just in the premises.

SMITH & PRINGLE,

Attorneys for Petitioner, Evan C. Evans.

United States of America,
Northern District of California. } ss.

I hereby return that I served the annexed petition on J. P. Jackson, Collector of Port of San Francisco, by handing to and leaving a true and correct copy thereof with said J. P. Jackson, personally, at san Francisco, in said district, on the 23d day of November, A. D. 1899.

JOHN H. SHINE,

United States Marshal.

By S. P. Monckton,

Office Deputy.

Filed November 23d, 1899. Southard Hoffman, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal.

Order Directing Board of General Appraisers to Make Return, etc.

Whereas, E. C. Evans, as importer, has applied to this Court for a review of the questions of law and fact involved in the decision of the Board of United States General Appraisers, on duty at the port of New York, State of New York, which said decision was made and rendered on the 24th day of October, 1899, classifying certain merchandise for duty as "Coal containing less than ninety-two per cent of fixed carbon, under paragraph 415 of the act of Congress, entitled 'An act to provide revenue for the Government, and to encourage the industries of the United States,' approved July 24, 1897, which said merchandise was imported into the port of San Francisco, California, and entered at the custom-house of said port on the 19th day of August, 1897, and is more fully described as being the merchandise subject to consumption entry No. 10,063, made at the custom-house, at said port of San Francisco, and whereas said Evans has filed in

the office of the clerk of this court a concise statement of the errors of law and fact in said decision complained of by him, and a copy of such statement has been served on the United States Collector of Customs for the port of San Francisco:

Now, therefore, upon consideration of the premises, and upon the motion of Messrs. Smith & Pringle, attorneys for said petitioner, it is hereby ordered that the Board of United States General Appraisers, on duty at the port of New York, State of New York, do, with all convenient speed, return and transmit to this Court the record of the matter of their said decision and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decision thereon, and it is further ordered that this order be entered in the minutes of this court, and be served by the United States marshal for the Southern District of New York on each member of said board, by delivering to each of them a certified copy thereof.

Dated November 25th, 1899.

WM. W. MORROW,
Judge.

[Endorsed]: Filed and entered November 25th, 1899. Southard Hoffman, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal.

Certified Copy Order Directing Board of Appraisers to Make Return, etc., with Return of Service by Marshal.

Whereas, E. C. Evans, as importer, has applied to this Court for a review of the questions of law and fact involved in the decision of the Board of United States General Appraisers, on duty at the port of New York, State of New York, which said decision was made and rendered on the 24th day of October, 1899, classifying certain merchandise for duty as "Coal containing less than ninety-two per cent of fixed carbon, under paragraph 415 of the act of Congress entitled "An act to provide revenue for the Government, and to encourage the industries of the United States," approved July 24, 1897, which said merchandise was imported into the port of San Francisco, California, and entered at the custom-house of said port on the 19th day of August, 1897, and is more fully described as being the merchandise subject to consumption entry No. 10,063, made at the cus-

tom-house, at said port of San Francisco, and whereas said Evans has filed in the office of the clerk of this court a concise statement of the errors of law and fact in said decision complained of by him, and a copy of such statement has been served on the United States Collector of Customs for the port of San Francisco:

Now, therefore, upon consideration of the premises, and upon the motion of Messrs. Smith & Pringle, attorneys for said petitioner, it is hereby ordered that the Board of United States General Appraisers, on duty at the port of New York, State of New York, do, with all convenient speed, return and transmit to this Court the record of the matter of their said decision and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decision thereon, and it is further ordered that this order be entered in the minutes of this Court, and be served by the United States marshal for the Southern District of New York on each member of said board, by delivering to each of them a certified copy thereof.

Dated November 25th, 1899.

WM. W. MORROW,
Judge.

[Endorsed]: Filed and entered November 25th, 1899. Southard Hoffman, Clerk.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

I, Southard Hoffman, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order signed, filed and entered on the 25th day of November, A. D. 1899, as the same appears of record in the clerk's office of said court in the therein entitled matter.

Attest my hand and the seal of said Circuit Court, this 25th day of November, A. D. 1899.

[Seal] SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[10 cents Internal Rev. Stamp.]

[Endorsed]: I hereby certify that on the 4th day of December, 1899, at the city of New York, in my district, I personally served an order, of which the annexed is a certified copy, upon H. M. Somerville, I. S. Fischer and J. B. Wilkinson, Jr., the Board of United States General Appraisers, on duty at the port of New York, State of New York, by delivering to and leaving with each of said general appraisers a certified copy of said order.

Dated, New York, December 4th, 1899.

WILLIAM HENKEL,
United States Marshal, Southern District of New York.

Filed December 21, 1899. Southard Hoffman, Clerk.

Return of the Board of United States General Appraisers.

In the Circuit Court of the United States for the Northern District of California.

J. A. LAKE, Chief Clerk Board of U. S. General Appraisers.

In the Matter of the Application of E. C. EVANS for Review of the Decision of the Board of United States General Appraisers, as to the Rate, etc., of Duty on Certain Coal Imported by him per "Kambria," August 19, 1897. } Suit No. 1452.

Return of the Board of United States General Appraisers to the order of Hon. WM. W. MORROW, Circuit Judge.

Dated New York, Feb. 1, 1900.

The board of United States General Appraisers, sitting at New York, in response to the order of the Court in the above matter, make the following return of the record and evidence taken by them in the above matter, and of the facts involved therein, as ascertained by them.

They state that a letter, a copy of which is hereto annexed as Exhibit "A," was received from the Collector of Customs at New York, submitting, under the provisions of section 14 of the act of June 10, 1890, the protest marked Exhibit "B," and described as follows:

Colls. No.	Board No.	Protestants.	Vessel.	Date of Entry.
4248	41600-B	E. C. Evans	Kambria	Aug. 19, '97

On October 24th, 1899, the board rendered its decision upon said protest. A copy of the opinion is annexed as Exhibit "C."

Exhibit "A."

(Copy.)

Office of the Collector of Customs,
Port of San Francisco,
Aug. 8, 1899.

Hon. Henderson M. Somerville, Chairman Board of Classification of Board of Gen. Appraisers, New York, N. Y.

Sir: I respectfully acknowledge the receipt of your letter of July 31, 1899, 41407-B, in relation to classification of coal claimed to be anthracite, and, as requested therein, beg to transmit herewith 43 protests, numbered from 4247 to 4289, involving the question of the proper classification of coal containing less than 92 per cent of fixed carbon, and claimed to be entitled to free entry under paragraph 523 of the existing statute.

The requirements of section 14 of the act of June 10, 1890, have been complied with.

(Sd.) I. P. JACKSON,
Collector.

Exhibit "B."

PROTEST.

San Francisco, Sept. 21, 1897.

To the Collector of Customs, District and Port of San Francisco,

Sir: We hereby protest against the liquidation of our entry, and the assessment and payment of duties as ex-

acted by you on 1711-19-0-2 tons anthracite coal, marks and numbers said to be N-N N-M, but this protest is intended to cover and apply to all the goods of the same kind and character mentioned in the invoice or entry, whether specifically mentioned herein or not.

Said merchandise was imported by us on the 4th day of August, 1897, in the "Kambira" from Tonquin, and is more fully described in Deposit Entry No. 10063.

The grounds of our objections are that said importation is anthracite coal, and so known to the trade commercially, being invoiced, manifested, bought, sold, and trafficked in only as anthracite coal, and is entitled to free entry as specially provided for by name under paragraph 523 in the free list of the act of July 24th, 1897, as coal anthracite, not specially provided for by name elsewhere in said act.

We pay the amount exacted solely to obtain possession of the goods, and claim that the entry should be readjusted, and the amount overcharged refunded to us.

Yours, respectfully,

EVAN C. EVANS.

[Endorsed]: Entry No. 10,063. Bond No. . Protest. San Francisco, Sept. 21, 1897. Messrs. E. C. Evans. Against liquidation of entry assessment, and exaction of 67 cents ton on anthracite coal. Vessel, "Kambira." From Tonquin. Date of arrival, Aug. 4th, 1897. Date of entry, Aug. 19th, 1897. Date of liquidation, Sept. 15th, 1897.

Adjuster's Office, Custom-House, S. F., Cal. Received Sep. 23, 1897, W.

Exhibit "C."

No. Pages
Typewritten by Miss Coyce.
Compared by Miss Clark.

General Appraisers.

Form 53.

Not for Publication.

Dictated.

In the Matter of the Protests 35716-B, etc., of Meyer, Wilson & Co. et al., against the decision of the Collector of Customs at San Francisco, Cal., as to the Rate and Amount of Duties Chargeable on Certain Merchandise (Coal) Imported per the Vessels and Entered on the Dates Specified in the Schedule Hereto Appended.

Before the U. S. General Appraisers at New York, Oct. 24, 1899.

Opinion by Tichenor, G. A.:

We find as matter of fact that the merchandise in question is coal which contains less than 92 per cent of fixed carbon.

We hold in accordance with the decision of the United States Circuit Court for the Northern District of California, in the suit of Chas. P. Coles, rendered April 23, 1899,

(95 Fed. Rep. 954), and upon the authority of G. A. 4484, that this merchandise was properly assessed for duty at 67 cents per ton under the provisions of paragraph 415, act of July 24, 1897, and overruled the protests which claim that it is exempt from duty under paragraph 523 of said act.

(Sig.) H. M. SOMERVILLE,
I. F. FISCHER,
J. B. WILKINSON, Jr.,
Board of Classification of U. S. General Appraisers.

Schedule.
41600-B.

And for a certified statement of the facts involved in said matter, as ascertained by them, the said board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said board than such as are shown by said decision and other exhibits hereto attached.

H. M. SOMERVILLE,
GEO. C. TICHENOR,
I. F. FISCHER,
Board of U. S. General Appraisers.

[Endorsed]: Return of the Board of United States General Appraisers. Filed February 6, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal.

Stipulation as to Merchandise, etc.

For the purposes of the trial of the above-entitled action, it is hereby stipulated and agreed and admitted that the merchandise in question in this case was a cargo of anthracite coal imported from Tonquin into the port of San Francisco, in California, subsequent to the twenty-fourth day of July, 1897. The cargo contained less than ninety-two per cent of fixed carbon; and that the word "anthracite" is a commercial definition applied to coal having certain characteristics distinguishing it from other coals.

Dated August 11th, 1900.

MARSHALL B. WOODWORTH,
Assistant United States Attorney.
SIDNEY V. SMITH,
Attorney for E. C. Evans.

[Endorsed]: Filed August 11th, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal.

Findings.

The above case having regularly come up before the Court on appeal from the Board of United States General Appraisers, and due consideration having been had, the Court now makes and files its findings of fact, as follows:

I.

The merchandise in question in this case was a cargo of anthracite coal imported from Tonquin into the port of San Francisco, in California, subsequent to the twenty-fourth day of July, 1897. The cargo contained less than ninety-two per cent fixed carbon.

II.

The word "anthracite" is a commercial definition applied to coal having certain characteristics distinguishing it from other coals.

Upon the foregoing facts, I find, as a matter of law, that the imported article is properly classified under the

head of "Coal containing less than ninety-two per centum of fixed carbon," and is subject to duty at the rate of sixty-seven cents per ton under paragraph four hundred and fifteen of the act of July 24th, 1897, and that the decision of the Board of United States General Appraisers that it is subject to duty at such rate should be sustained.

It is ordered that judgment be entered herein accordingly.

Dated August 11th, 1900.

WM. W. MORROW,
Judge.

[Endorsed]: Filed August 11th, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal.

Judgment on Findings.

This matter came on regularly for hearing, the parties appearing by their attorneys, Sidney V. Smith ap-

peared on behalf of the petitioner, E. C. Evans, and Marshall B. Woodworth, Assistant United States Attorney, appeared on behalf of the United States. The matter was tried before the Court, upon the pleadings, proofs, and arguments of counsel, duly heard and considered, and the Court having found the facts and the conclusions of law thereupon, filed the same, and ordered that judgment be entered in accordance therewith.

Wherefore, by virtue of the law and the findings aforesaid, it is ordered, adjudged, and decreed that the imported article named in the petition herein is properly classified under the head of "Coal containing less than ninety-two per centum of fixed carbon," and that the decision of the Board of General Appraisers that it is not free of duty, and that it should be charged with a duty of sixty-seven cents per ton, be, and the same is, hereby sustained.

Judgment entered August 11, 1900.

SOUTHARD HOFFMAN,
Clerk.

A true copy.

Attest:

[Seal] SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: Filed August 11th, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, etc. } No. 12,846.

Certificate to Judgment-Roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled matter.

Attest my hand and the seal of said Circuit Court, this 11th day of August, 1900.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Filed August 11th, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal.

Bill of Exceptions.

Be it remembered that on the 11th day of August, 1900, the said matter came on regularly to be heard in the United States Circuit Court, Ninth Circuit, in and for the Northern District of California, upon the petition of the above-named petitioner and appellant, E. C. Evans, duly filed in said court, praying for a review of the decision of the Board of United States General Appraisers heretofore made herein sustaining the action of the Collector of Customs for the port of San Francisco, in said Circuit and District and State herein, and upon the return to said court of said Board of United States General Appraisers herein, and upon the stipulation of the parties hereto filed herein, which is in the words and figures following.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal.

For the purposes of the trial of the above-entitled action, it is hereby stipulated and agreed and admitted that the merchandise in question in this case was a cargo of anthracite coal imported from Tonquin into the port of San Francisco, in California, subsequent to the twenty-fourth day of July, 1897. The cargo contained less than ninety-two per cent of fixed carbon; and that the word "anthracite" is a commerical definition applied to coal having certain characteristics distinguishing it from other coals.

Dated August 11th, 1900.

MARSHALL B. WOODWORTH,
Assistant United States Attorney.
SIDNEY V. SMITH,
Attorney for E. C. Evans.

Now, therefore, whereas the foregoing matters hereinbefore particularly set forth, appear not of record to the end that said matters, and all thereof, may be preserved and made of record, your petitioner, the above-

named E. C. Evans, hereby respectfully presents to this Honorable Court the foregoing bill of exceptions, and prays that the same may be settled and allowed as and for the bill of exceptions in the above-numbered and mentioned case.

E. C. EVANS,
Petitioner and Appellant.
By SIDNEY V. SMITH,
His Attorney.

It is hereby stipulated by and between the parties hereto, and their respective counsel, that the foregoing bill of exceptions contains a full, true, and correct report and statement of all the testimony and evidence introduced by either side in the above-mentioned and numbered case, and may be settled, allowed, and approved as and for such bill of exceptions, and ordered filed as of August 11th, 1900.

SIDNEY V. SMITH,
Attorney for E. C. Evans.
MARSHALL B. WOODWORTH,
Assistant United States Attorney.

The foregoing bill of exceptions in the above case is hereby settled, allowed and approved, and ordered filed nunc pro tunc as of August 11th, 1900.

Dated August 11th, 1900.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed August 11th, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal.

Petition for Appeal.

The above-named petitioner, appellant herein, conceiving himself aggrieved by the decision and judgment rendered and entered on the eleventh day of August, 1900, in the above-entitled and numbered case, doth hereby appeal from said decision and judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, and prays that this his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decision and judgment were made and rendered, duly authenticated, may be sent to said Circuit Court of Appeals.

Dated August 13th, 1900.

E. C. EVANS,
Petitioner and Appellant.
By SMITH & PRINGLE,
His Attorneys.

Order Allowing Appeal.

And now, to wit, on the 13th day of August, 1900, it is ordered that said appeal be allowed as prayed for, on filing bond in the sum of five hundred dollars.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed August 13th, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal.

Assignment of Errors.

And now upon this 13th day of August, 1900, comes the above-named petitioner and appellant, by Smith & Pringle, his attorneys, and says that in the record herein there is manifest error in this, to wit:

I.

That the said Circuit Court erred in finding and deciding that the merchandise herein is not entitled to admission free of duty under paragraph 523 of the act of July 24, 1897, entitled "An act to provide revenue for the Government, and to encourage the industries of the United States."

II.

That the said Circuit Court erred in finding and deciding that the merchandise involved herein should be classified as "Coal containing less than ninety-two per cent of fixed carbon."

III.

That the said Circuit Court erred in finding and deciding that the merchandise involved herein is subject to a duty of sixty-seven cents per ton.

IV.

That the said Circuit Court erred in not finding and deciding that the merchandise involved herein is anthracite coal entitled to admission free of duty, under paragraph 523 of said act.

V.

That the said Circuit Court erred in holding, adjudging and deciding that the decision of the Board of United States General Appraisers herein should be sustained.

VI.

That the said Circuit Court erred in holding, adjudging and deciding that judgment should be entered affirming the said decision of the Board of United States General Appraisers herein.

VII.

That the said Circuit Court erred in not holding, adjudging and deciding that the decision of the Board of United States General Appraisers herein should be reversed.

VIII.

That the said Circuit Court erred in not holding, adjudging and deciding that judgment should be entered for the petitioner and appellant herein in accordance herewith.

SMITH & PRINGLE,
Attorneys for Petitioner and Appellant.

[Endorsed]: Filed August 13, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal.

Bond on Appeal.

Know all men by these presents, that we, E. C. Evans, as principal, and John L. Howard and Sidney V. Smith, as sureties, are held and firmly bound unto the Collector

of the Port of San Francisco, in the full and just sum of five hundred dollars, to be paid to the said Collector of the Port of San Francisco, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 13th day of August, in the year of our Lord one thousand nine hundred.

Whereas, lately at a session of the Circuit Court of the United States, for the Northern District of California, in the above-entitled cause judgment was rendered against the said E. C. Evans having obtained from said Court permission to appeal from said judgment, to reverse the said judgment in the aforesaid court, and a citation directed to the said Collector of the Port of San Francisco is about to be issued, citing and admonishing said Collector to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 12th day of September next:

Now, the condition of the above obligation is such, that if the said E. C. Evans shall prosecute said appeal to effect, and shall answer all damages and costs that shall be awarded against him, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

A. B. WILLIS.

CHAS. P. COLES.

EVAN C. EVANS,

By his Attorneys in Fact.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

John L. Howard and Sidney V. Smith, being duly sworn, each for himself, deposes and says, that he is a householder in said district, and is worth the sum of one thousand dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

JOHN L. HOWARD.
SIDNEY V. SMITH.

Subscribed and sworn to before me this 13th day of August, A. D. 1900.

[Seal] HOWARD HARRON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Bond on appeal. Approved, Wm. W. Morrow, Circuit Judge. Filed August 13, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the Matter of the Application of E. C. EVANS for Review of a Decision of the Board of United States General Appraisers, Dated October 24th, 1899, as to the Duty to be Paid on Certain Anthracite Coal. } No. 12,846.

Clerk's Certificate to Record.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing pages, numbered from one to twenty-seven, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled matter, and that the same together constitute the transcript of the record herein, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $17.35, and that said amount was paid by.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 15th day of August, A. D. 1900.

[Seal] SOUTHARD HOFFMAN,

Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[Ten Cent U. S. Int. Rev. Stamp Canceled.]

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Collector of Customs of the Port of San Francisco, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 12th day of September next, pursuant to an order allowing an appeal filed in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action numbered 12,846, wherein E. C. Evans is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said E. C. Evans as in the said judgment mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WM. W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this 13th day of August, A. D. 1900.

WM. W. MORROW,

Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this 14th day of August, 1900.

MARSHALL B. WOODWORTH,

Assistant United States Attorney, Attorney for Appellee.

[Endorsed]: No. 12,846. Circuit Court of the United States, Ninth Circuit, Northern District of California. E. C. Evans, Appellant, vs. The Collector of Customs of the Port of San Francisco, Appellee. Citation. Filed August 14, 1900. Southard Hoffman, Clerk.

[Endorsed]: No. 626. In the United States Circuit Court of Appeals, for the Ninth Circuit. E. C. Evans, Appellant, vs. The Collector of Customs of the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Circuit Court of the United States, for the Ninth Circuit, in and for the Northern District of California.

Filed August 16th, 1900.

F. D. MONCKTON,

Clerk.

No. 626

IN THE

NITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

n the matter of the application of
E. C. EVANS,
or review of a decision of the Board of United States General Appraisers, dated October 24, 1899, as to the duty to be paid on certain Anthracite Coal.

BRIEF FOR APPELLANT.

SMITH & PRINGLE,
Attorneys for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the matter of the Application of E. C. EVANS, For review of a decision of the Board of United States General Appraisers, dated October 24th, 1899, as to the duty to be paid on certain Anthracite Coal.	No. 621.

BRIEF FOR APPELLANT.

The question of this suit is whether a cargo of antharacite coal, containing less than ninety-two per cent of fixed carbon, should have paid duty, or should have been admitted free. It is the same question as was submitted to this Court in the case of Coles, reported in 100 Fed. 442, on appeal from the judgment of the Circuit Court, whose decision is reported in 93 Fed. 954.

The decision of this Court in the Coles case was rendered on February 5th, 1900, and was necessarily framed in ignorance of the conclusions arrived at by the Supreme Court of the United States in the case of *Chew Hing Lung* vs. *Wise*, in which the opinion was filed on January 22nd, 1900, and is to be found in 176 U. S. 156.

A petition for rehearing of the Coles case was filed in this Court, calling attention to the effect of the decision in the Chew Hing Lung case upon the questions involved in the Coles case, and was denied. Subsequently a petition for a writ of *certiorari* in the Coles case was filed in the Supreme Court of the United States, and was denied. (177 U. S. 695.)

In spite of the denial of the petitions for a rehearing and for a writ of *certiorari* in the Coles case, we now again bring before this Court the question of that case, and particularly the question of the bearing upon this Court's decision in that case of the Supreme Court's rulings in the Chew Hing Lung case.

We do this with our eyes open to the preliminary objection that may be made by opposing counsel, or by the Court itself, to the effect that the bearing of the Chew Hing Lung decision upon the Coles case was fully presented to the Supreme Court upon the application for the writ of *certiorari*, and to this Court in the petition for a rehearing; that the question should be considered as set at rest by the denial of those petitions;

and that this Court should not be again troubled with the discussion of a question, which it has once considered and decided.

But the denial of the petition for the writ of *certiorari* cannot be considered as determinative of anything except that the petition did not present a case in which a writ should issue. This probably did not depend upon any view taken by the Supreme Court touching the merits of the question of law presented by the petition, and the Court might very well have declined, and probably did decline, to consider the question at all, basing its refusal of the writ solely upon the consideration that the case was not one of grave general public importance, or one of a conflict of decision between two Circuit Courts of Appeal, or one affecting the interests of this nation in its internal or external relations, and so not within the narrow limitations which the Court has set upon the exercise of its power to grant the writ.

American Const. Co. vs. *Jacksonville Railway*, 148 U. S. 383;

Forsyth vs. *Hammond*, 166 U. S. 514.

The result of the refusal of the writ was simply to leave this Court as the Court of last resort, from which there is no appeal, even if this Court should be opposed in opinion and decision to the Supreme Court. It renders it all the more incumbent upon this Court, as we beg leave to respectfully suggest, to harmonize its decisions with the rulings of the Supreme Court, be-

cause for any error committed by this Court in ruling in a way which would not be approved by the Supreme Court there is no redress whatever.

Nor do we consider that the question of the effect of the decision in the Chew Hing Lung case upon the conclusions arrived at by this Court in the Coles case is set at rest by this Court's refusal of a rehearing in the latter case. For it is to be observed that it is a question which was not and could not have been *argued* before this Court, and that its presentation in and consideration upon a mere petition for a rehearing is not the equivalent of a discussion orally and by brief or of a decision made after such a discussion. With great respect we submit that, the Supreme Court having, after the decision in the Coles case was written, rendered a decision distinctly overruling nearly every one of the positions taken by this Court as a basis for its judgment in the Coles case, we are entitled, as a matter of pure right, to present and fully argue *de novo* the question involved in that case in the light thrown upon it by the Chew Hing Lung case. And we are the more strenuous in this insistence for the reason that the principal question now remaining, and hereinafter fully discussed, namely, whether the phrase "all coals "containing less than ninety-two per centum of fixed "carbon" is a descriptive phrase or a special provision, was never argued by counsel in the Coles case, nor remotely alluded to in the opinion rendered by this Court, nor more than touched upon by the petition for

a rehearing.

With this preface we proceed to the argument, and ask the Court first to review with us the history of the tapioca case of Chew Hing Lung, so that we may see the precise position in which the matter is left by the final determination of the Supreme Court.

That case arose under the tariff act of 1890 (26 Stats. 567), which provided (sec. 2, p. 602) that "on "and after the sixth day of October eighteen hundred "and ninety, unless otherwise specially provided for "in this act, the following articles when imported "shall be exempt from duty" and named (par. 730) tapioca as one of such articles.

The duty list (par. 323) imposed a duty upon "all "preparations, from whatever substance produced, fit "for use as starch".

It was held by the Circuit Court of the Ninth Circuit (*In re Wise*, 77 Fed. 734), that the dutiability of some tapioca imported into this port was a question of fact, namely, whether it was or not in fact fit for use as starch, and, following the decision of the Circuit Court of Appeals for the Second Circuit regarding an importation of tapioca into the port of New York (*In re Townsend*, 56 Fed. 222), that it was not, as a matter of fact, fit for use as starch, and was therefore exempt from duty. On appeal to this Court (83 Fed. 162) this Court held, as a matter of *fact*, that the imported article was fit for use as starch, and, as a matter of

law, that it was therefore specially provided for under par. 323. Recognizing the general rule that "in tariff " legislation the designation of an article *eo nomine* " must prevail over a general description that would " otherwise embrace it ", the Court cited *Magone* vs. *Heller*, 150 U. S. 70, as authority for the proposition that " a name under which an article is commercially " known will not control a specific provision respecting " it ", and, following that case, in which it was held that the phrase " expressly used for manure" was a specific provision which controlled the denominative mention of "sulphate of potash", decided that "fit for use as starch " was likewise a specific provision which controlled the denominative mention of tapioca. Necessarily and expressly the decision of this Court was based upon a construction of the statute of 1890 to this effect: tapioca is exempt from duty unless otherwise specially provided for; the clause concerning all preparations fit for use as starch is a special provision for all tapioca coming within its terms. Following this construction, the argument might have been thus syllogistically stated: All preparations fit for use as starch including tapioca must pay duty; but the imported article is tapioca fit for use as starch; therefore, the imported article must pay duty.

Reviewing this decision in *Chew Hing Lung* vs. *Wise*, 176 U. S. 156, the Supreme Court came to some conclusions diametrically opposed to those of this Court in the tapioca case, and, as we shall see, also dia-

metrically opposed to the conclusions of this Court in the Coles case.

Differing from this Court, and reversing its judgment, the Supreme Court held, as a matter of law (p. 159), that, assuming the imported article to be fit for use as starch, still it was not specially provided for by par. 323; that the phrase "fit for use as starch" is a descriptive one, which, under the general rule, must yield to the designation of an article *eo nomine*, and not a specific provision like the phrase "expressly used for manure", which figured in *Magone* vs. *Heller*.

We have said that this decision was not to be reconciled with the decision of this Court in the Coles case. To ascertain whether this is so or not requires a closer view of both decisions.

The ultimate conclusion of this Court in the Coles case was that anthracite coal containing less than ninety-two per cent of fixed carbon is specially provided for by par. 415 of the *Dingley Act* (30 Stats. 151), and is not to be classified under the denominative mention of anthracite in the free list (par. 523). Just as this Court had held *in re Wise* that "all preparations fit for use as starch" was a special provision applicable to tapioca coming within its terms, so it held that "all coal containing less than ninety-two per "centum of fixed carbon" was a special provision applicable to anthracite coming within its terms.

The argument of the Court leading up to this con-

clusion may be thus syllogistically stated: All coal containing less than ninety-two per cent of fixed carbon must pay duty; but the imported article is coal containing less than ninety-two per cent of fixed carbon; therefore, the imported article must pay duty.

It had been argued for Coles, the importer, that the logical method of reading the two clauses of the statute together, in view of the general rule regarding the controlling effect of a denominative mention of an article over a general description which might otherwise include the designated article, was to regard the article specially mentioned *eo nomine* as an exception to the general description. In this view the Court was asked to read the statute as if it were written: all coals containing less than ninety-two per cent of fixed carbon, except anthracite, must pay duty.

But this Court regarded this suggestion as an attempt to "amend" par. 415, and declined to adopt the suggestion. The principle of construction thus contended for by the importer and rejected by the Court was, however, the very one adopted by the Supreme Court in the case of Chew Hing Lung (p. 159). There the Court, assuming that tapioca flour is, within the general description of the duty list, fit for use as starch, remarked that, "yet, by virtue of " paragraph 730, tapioca is placed on the free list, and " the substance tapioca flour, being tapioca in one of " its forms, is *excepted* from the general language of " paragraph 323, and is entitled to free entry. It is so

" excepted, because although assuming it to be fit for " use as starch, it is nevertheless tapioca, and tapioca " is in so many words put on the free list. Effect is " thus given to the general language of the paragraph " concerning starch and all preparations fit for use as " such, *excepting* therefrom the one article specially " named in paragraph 730, to which effect is given by " allowing the *exception*". And the Court pointed out that this method of construction is only an application and expression of the rule that the designation of an article, *eo nomine*, either for duty or as exempt from duty, must prevail over words of a general description, which might otherwise include the article specially designated.

If this Court had in the Coles case followed this rule of construction so unhesitatingly adopted by the Supreme Court, it would have held that, although the imported article was coal containing less than ninety-two per cent of fixed carbon, and so included in the general terms of the duty list, it was nevertheless anthracite, which is, in so many words, put on the free list. Effect would thus have been given to the general language of the paragraph concerning coals containing less than ninety-two per cent of fixed carbon, excepting therefrom the one article specially named in paragraph 523, to which effect would have been given by allowing the exception.

It was further argued for the importer in the Coles case, that this rule of construction, which treats a de-

nominative designation as an exception to the terms of a general description, was not to be affected by the presence in par. 523 of the words "not specially provided for in this act"; that these words must be taken literally and could only be satisfied by a provision elsewhere in the act specially applicable to anthracite; that the general description of "all coals containing " less than ninety-two per centum of fixed carbon" was not a provision specially applicable to anthracite, but the reverse; that there was nowhere outside of the free list a provision specially applicable to anthracite or any provision which could gratify these words in par. 523; and that therefore the words should be disregarded in the construction of the act.

The argument was disposed of by this Court by a reference to the fact that the duty list applied to "all coal", which the Court held to be a term "*comprehensive* " enough to include anthracite as well as any other " kind of coal, whether specifically named or not". The duty list was therefore held to answer the call of the free list for a specific provision applicable to anthracite, not because it was *specific* enough, but because it was *comprehensive* enough to include anthracite. This would seem to be a distinct violation of the general rule of construction that the comprehensive must yield to the specific, and is in direct opposition to the ruling of the Supreme Court in the Chew Hing Lung case on the precise point.

The phrase there considered, "*all* preparations, from

" whatever substance produced", was quite as comprehensive as the phrase "all coal". No phrase, indeed, could be more comprehensive, and yet the Supreme Court held that it must yield to the denominative mention of tapioca, although the latter was coupled with the expression "unless otherwise specially pro-" vided for in this act", with which the free list began, and which therefore was to be read into every clause and line of the free list with all the force which it would have had if actually written after it in each clause.

This Court treated these words as a *qualification* of the denominative designation of anthracite, saying: "An-" thracite coal is, it is true, specifically named; but it " is to be admitted free, subject to the qualifying " clause, 'not specially provided for in this act'. This " materially changes the meaning that might other-" wise be attributed to it if this qualification had not " been added".

The Supreme Court, on the contrary, held that the presence in the free list of the words "unless otherwise " specially provided for in this act", instead of qualifying or weakening the denominative designation of tapioca, "*strengthened* the argument that tapioca flour, " being in fact tapioca in one of its well known forms, " was exempt from duty, because in order to be exempt " the article must be otherwise specially made dutiable. " It is not so made dutiable, and is therefore by the " clear provision of the act made free of duty". It was

urged upon the Supreme Court, that tapioca flour was otherwise specially provided for in the act by par. 323, but as to this the Court said:

> "We cannot concur in this view. Tapioca flour is not otherwise specially provided for in par. 323. It is not mentioned specially nor is it named at all in that paragraph, which uses only general language relating to starch and all preparations from whatever substance produced, fit for use as starch. If tapioca flour be such a preparation it would be included in that general description if not otherwise exempted. But there is no special provision for tapioca flour, making that substance, in terms, dutiable under that paragraph, while in the free list there is a special designation of tapioca, and tapioca flour is tapioca".

It is thus seen that the Supreme Court followed the very line of argument urged upon this Court in the Coles case, and held, in spite of the very comprehensive language of the duty list, which included tapioca flour, because tapioca flour was a preparation fit for use as starch, that the words "unless otherwise specially pro-" vided for in this act", prefacing the free list, could only be satisfied by a provision specially applicable to tapioca flour, in the literal sense, and could not be and were not satisfied by a general clause comprehensive enough to include tapioca flour.

If this Court had in the Coles case adopted the view taken by the Supreme Court, it would have held that the words "not otherwise specially provided for by this act", with which the denominative mention of anthracite in the free list is coupled, so far from being a

qualification of the denominative mention of anthracite, *strengthens* the legislative declaration that anthracite shall be free from duty, by distinctly and positively adding that this shall be so unless anthracite is somewhere else in the act specially subjected to duty; and that anthracite is not otherwise specially provided for n par. 415, because it is not mentioned specially nor is it named at all in that paragraph, which uses only general and comprehensive language relating to coal containing less than ninety-two per cent of fixed carbon. This Court would have said: there is no special provision for anthracite coal containing less than ninety-two per cent of fixed carbon, making that substance, in terms, dutiable under par. 415, while in the free list there is a special designation of anthracite, and anthracite containing less than ninety-two per cent of fixed carbon is anthracite.

It thus appears that the reasons for this Court's decision in the Coles case, were the following:

FIRST. It would be an unwarranted amendment to the statute to read it as if anthracite were excepted from par. 415.

SECOND. The expression "all coal" in par. 415 is comprehensive enough to include anthracite.

THIRD. The words "not otherwise specially provided for in this act" are a qualification of the denominative designation of anthracite in par. 523.

FOURTH. Par. 415 is a special provision for an-

thracite containing less than ninety-two per cent of fixed carbon.

These were the only questions discussed in the opinion of this Court. Similar questions were discussed by the Supreme Court in the case of Chew Hing Lung, and as to each and all of them the Supreme Court took a view and rendered a conclusion utterly opposed to the views and conclusions of this Court. It may therefore be truly said, that, as far as concerns the questions which were argued and expressly decided by this Court in the Coles case, its opinion and judgment are at variance with the principles laid down by the Supreme Court of the United States.

It only remains to see whether its judgment can be supported by considerations which were discussed by the Supreme Court in the Chew Hing Lung case, but were not alluded to by this Court in the Coles case.

The ultimate conclusion of the Supreme Court in the Chew Hing Lung case was that the phrase "all preparations fit for use as starch" could not control the denominative mention of tapioca, because it was a phrase of general description, in obedience to the rule that the designation of an article *eo nomine* must prevail over words of a general description which might otherwise include the article specially designated. Speaking of this phrase, the Court said:

> "That paragraph is general in its nature, and provides for a duty upon starch, including in that name all preparations from whatever substance

> produced, fit for use as starch. Any preparation, therefore, which is fit for that use would come within that general description."

The Court evidently regarded the paragraph as "comprehensive enough" to include tapioca flour, fit for use as starch, but held that, although comprehensive enough to include tapioca, it could not do so because it was descriptive as well as comprehensive, the rule being that words of description cannot control denominative mention.

In the Coles case this Court held that the phrase "all coals containing less than ninety-two per cent of "fixed carbon" was a comprehensive one, of sufficient breadth to include anthracite, and for that reason held that it must control the denominative designation of anthracite. Evidently, this conclusion is out of harmony with the opinion of the Supreme Court, if, besides being a comprehensive phrase, it is also a descriptive one in the sense in which "all preparations fit for use as starch" was held by the Supreme Court to be one of general description; and if, in that sense, paragraph 415 of the *Dingley Act* is "general in its nature", although it might otherwise include anthracite coal coming within its general terms, it cannot do so, in the view of the Supreme Court, because anthracite is denominatively designated in the free list.

We thus see that the effect of the decision in the Chew Hing Lung case is to narrow the question of this case to one single consideration: Is paragraph 415

of the *Dingley Act* "general in its nature", "a general description", in the sense in which paragraph 323 of the *Wilson Act* was held by the Supreme Court to be general in its nature and a general description? If it is, then the decision in the Coles case was out of harmony with the opinion of the Supreme Court, and, if it be desirable that the lower Federal Courts should follow the expressed opinions of the Supreme Court, even in cases in which there is no appeal to the Supreme Court, this Court should now, having before it an opinion of the Supreme Court which had not reached it when the decision in the Coles case was rendered, conform its opinion to that of the Supreme Court, and overrule its own decision in the Coles case.

In examining this question the only logical method is to determine first precisely what the Supreme Court meant when it said that paragraph 323 of the *Wilson Act* was general in its nature and a general description; why, for what reason, it so held. Having discovered the reasons which led the Supreme Court to that conclusion, we shall be in a position to learn whether or not, for the same reasons, paragraph 415 of the *Dingley Act* is general in its nature and a general description. And if we find that the reasons which led the Supreme Court to hold that paragraph 323 of the *Wilson Act* was general in its nature and a general description are fully applicable to paragraph 415 of the *Dingley Act*, we shall be forced to conclude that

the decision of the Coles case should be overruled, unless we are prepared to say that the lower Federal Courts should disregard the opinions of the Supreme Courts in cases in which there is no appeal to the Supreme Court.

The reasons leading the Supreme Court to regard paragraph 323 of the *Wilson Act* as general in its nature and a general description are not explicitly set forth in the Court's opinion, but they are to be gathered with sufficient distinctness from what the Court does say, taken in connection with a few obvious considerations touching the nature of tariff legislation, and the history of judicial opinion on that legislation.

The tariff acts denote the subjects of importation with which they deal in three ways, which, for the purposes of this discussion, may conveniently be termed classification, denomination and demonstration.

To *classify*, says Webster, is "to arrange in sets according to some common properties or characters." Classification, then, is the arrangement of things in sets according to their common properties or characters.

To *describe*, says Worcester, is "to define by properties or accidents", and the Standard Dictionary defines a *description* as "a group of attributes or char-
" acteristics present in or constituting a class".

A *classification*, therefore, according to these authorities, is necessarily descriptive, because it denotes the

articles which it groups together by a reference to their common properties, accidents, qualities or characteristics. And, in one of its senses, a description is the equivalent of a classification.

Denomination is the opposite of classification, and proceeds by naming things, by designating them *eo nomine*, without reference to their qualities or description, or to the groups or classes into which they may fall, or to attributes or characteristics which they may have in common with other articles. It is a more specific method of designation than that of classification, and as, logically, the particular must be a limitation upon the general, we have the legal rule of construction, that, as between a general descriptive classification and a denominative designation, the latter shall be deemed to be an exception upon and from the former, or, as the rule is ordinarily expressed, that the denominative designation shall prevail over the general descriptive classification. That this is the sense in which the phrase "general description" is used by the Supreme Court in the Chew Hing Lung case, to wit: a descriptive classification by reference to the qualities of a thing which it possesses in common with other articles in the same class, is manifest from a glance at the cases to which the Court referred (p. 160) as authority for the rule of construction which it applied.

In *Homer* vs. *The Collector*, 1 Wall, 486, the first of the cases cited by the Supreme Court, the conflict was

between a provision for "dried fruit" and one for "almonds" *eo nomine*. It is evident that the term "dried fruit" is a classification pure and simple of all fruits possessing the common quality of being *dried*, and that if it is regarded as a "general description", it must be because "general description" is the equivalent of qualitative classification.

So, in *Reiche* vs. *Smythe*, 13 Wall. 162, cited next by the Court, the conflict was between "all live animals", (a most comprehensive phrase) and "birds". The first is a classification of all animals having the quality of being alive, and yielded to the specific mention of a certain kind of animals.

In *Movius* vs. *Arthur*, 95 U. S. 144, the contrast was between "finished skins" and "patent leather". The first is a classification of all skins having the common quality of being finished; the second is a denominative mention of a certain kind of finished skins.

In *Arthur* vs. *Lahey*, 96 U. S. 112, as in *Arthur* vs. *Morrison*, 96 U. S. 108, the conflict was between the specific mention of articles made of silk by their commercial designation, and a clause covering "all manufactures of silk". The latter was a classification of all articles having the common quality of being made of silk.

Arthur vs. *Rheims*, 96 U. S. 143, presented a conflict between "artificial flowers" a denominative mention, and "manufactures of cotton" a classification of all

articles having the common quality of being made of cotton.

This list of cases illustrating the control of a denominative designation over a clause general in its nature might be largely extended, and in every one of the cases in which the rule was applied it would be found that the general clause, which the Court subjects to the mention of an article *eo nomine*, though variously termed "a general description", (*American Net and Twine Co.* vs. *Worthington*, 141 U. S. 474), "a description" (*Solomon* vs. *Arthur*, 102 U. S. 212), "a general expression" (*Barber* vs. *Schell*, 107 U. S. 620), "descriptive" *Robertson* vs. *Glendenning*, 132 U. S. 159), is essentially a classification of articles by reference to their qualities or material, to the characteristics which they have in common and in reference to which they are grouped, and the conclusion is irresistible that the Supreme Court, in applying the rule of construction established by those cases to the case before it, and in using the same phraseology as had so many times before been used by the Court, intended to hold and did hold that the case before it was of precisely the same complexion as the others, and that the "paragraph of a general nature", which it subjected to the controlling effect of the denominative designation in the free list, and which it termed "a general description", was so because and only because it was a classification of articles by reference to their qualities and characteristics. In this view the Supreme Court held,

although it did not say so in so many words, that the phrase "all preparations fit for use as starch" was a classification in one group of all articles related to each other by their common quality of fitness for use as starch.

Even if there were any doubt that this was what the Court meant by speaking of this phrase as a general description, the doubt would be removed by a consideration of its treatment of the case of *Magone* vs. *Heller*.

We have thus far considered the relative importance and the effect upon each other of two of the modes in which imported articles may be designated by the tariff acts: designation *eo nomine* and descriptive classification. But there is still a third mode of designation, which, for convenience sake, we have termed that of demonstration. By this we mean the mode which the Legislature adopts when it designates articles without reference to their names, or to their relations to other articles with which they may be classed or grouped by reason of qualities or attributes which they possess in common with other articles. This mode of designation is frequently resorted to in the tariff acts, and is quite distinct from either denomination or classification, amounting to a legislative declaration that articles coming within its terms shall be admitted free or subjected to duty, as the case may be, without regard to their names, or their qualities, or their position in a class. By this method of designation a thing is neither described nor named; it is

pointed out, not by reference to its relations to other things, or its commercial appellation, but simply by reference to the objects of its importation or the functions it performs. Thus books imported for the use of the Congressional Library, or documents issued by foreign governments, or articles imported from Porto Rico, or coal stores of American vessels, etc., etc., are exempted from duty, or subjected to a special duty, as the case may be. The designation of these articles is demonstrative. It is not descriptive or denominative. And it is necessarily exclusive of and controls the other modes of designation, because it amounts to an express, positive, substantive legislative enactment in regard to all articles thus pointed out, whatever may be their classification, or their description or their names.

A designation of this demonstrative nature figured in *Magone* vs. *Heller* (150 U. S. 70), in which a very general form of expression, "all substances expressly used for manure", was presented to the Court, in conflict with the denominative mention of "sulphate of potash". In the trial Court (*Heller* vs. *Magone*, 38 Fed. 910) the Court was moved to direct the jury to find for the defendant "on the ground that the im-
" ported article is 'sulphate of potash', and is provided
" for in said tariff act *eo nomine* as 'sulphate of potash',
" a specific expression; and, if otherwise covered by
" the general expression 'all substances expressly used
" for manure', is not therefore provided for under such
" general expression".

It will be observed that the ground of the motion was, that the words "expressly used for manure" were a "general expression" which should, under the rule of *Arthur* vs. *Lahey*, 96 U. S. 112, and the cases there cited, yield to a denominative designation. But the Court declined to accept this view, and denied the motion, saying:

> "The clause here very clearly expresses, and there seems no doubt that by the use of this phrase Congress has plainly said, that all imported substances, whether specially provided for *eo nomine*, or covered by any general language descriptive of their origin or qualities, which subserve the purpose of enriching the soil, should be free."

The Court thus held, that a demonstrative designation like the one before it, must control a denominative mention, or any descriptive classification. On appeal to the Supreme Court the view of the trial Court was adopted and affirmed. It was again urged in that Court (150 U. S. 72), that the imported article was covered by the specific expression "sulphate of potash" rather than by the general expression "expressly used for manure", but the Supreme Court overruled this contention, and held (p. 73) that "by force of the very " clause in question 'all substances expressly used for " manure' must be exempt from duty". This was only another way of saying, with the trial Court, that the clause in question was a positive, substantive enactment affecting articles coming within its terms, whether elsewhere in the act specially named or gen-

erally described or not.

The Supreme Court thus made a clear distinction between the general clause before it and the general clauses which had, in the preceding cases, been made to yield to a mention *eo nomine*. It distinguished between a general expression which should be controlled by a denominative designation, and a general expression which should prevail over a denominative designation. And it is apparent that the essence of the distinction is the difference which exists between a phrase of descriptive classification, such as had figured in the preceding cases, and a phrase, not of description or classification, but of demonstrative force, which *proprio vigore* applies to all articles included by its terms without regard to their qualities, or their description or their classification.

For it is to be observed, that "expressly used for manure" is not a descriptive phrase, nor one referring to the qualities of a thing, nor to its place in a group or class with other things possessing attributes in common with it. It is a phrase essentially similar to "imported for the use of the Congressional library", or "documents issued by foreign governments", or "imported from Porto Rico", or "coal stores of American vessels". It ignores description, quality, material and classification altogether. It applies to all things actually *used* for certain purposes, without regard to the qualities which cause them to be so used.

The distinction, therefore, which was recognized and acted on by the Court, was the one between the qualities causing a thing to be used for a purpose, and the mere fact of such use. If the phrase before the Court had grouped and classified substances by reference to any quality which they possessed in common, it would have been a general descriptive phrase which would have been controlled by a mention of any such substance *eo nomine*; but as it made no attempt at classification or description, nor any reference to the qualities of such substances as come within its terms, the Court treated it as a sweeping enactment attaching to everything, without exception, which by force of the language used could come within its scope.

Perhaps an illustration may make the distinction clearer. If a tariff act should impose a certain rate of duty upon all articles made from the leaf of the tobacco plant, and another rate of duty upon cigars, cigars would be treated as an exception from the more comprehensive clause concerning all articles made from the tobacco leaf, because cigars are mentioned by name, and the more comprehensive clause is one classifying things by a reference to the substance from which they are made. But if a tariff act should relieve from duty all articles imported from Porto Rico, and should impose a duty upon cigars, cigars would not be excepted from the first clause, because the clause is not a classification but a positive legislative enactment of all-controlling force.

That this is the meaning of *Magone* vs. *Heller*, appears more clearly still in the Supreme Court's explanation of it in the Chew Hing Lung decision.

This Court had held in *Wise* vs. *Chew Hing Lung* (83 Fed. 165) that "all preparations fit for use as starch" was a "specific provision", which should prevail over the designation of tapioca *eo nomine*, in the same way and for the same reason as the phrase before the Court in *Magone* vs. *Heller* had been made to control the designation *eo nomine* of sulphate of potash. But the Supreme Court, disagreeing with this Court and reversing its judgment (176 U. S. 161) held that the case was not within the principle decided in *Magone* vs. *Heller*, and, in giving its reason for this conclusion, illuminated the very distinction we are insisting on. Said the Court:

> "If the statute in this case had said that starch was dutiable, including all preparations from whatever substance produced, expressly intended and fit for use as starch, then tapioca flour, if fit and intended for such use, might be dutiable under the paragraph in question, and not be exempt as a form of tapioca. But when the language is, fit for use as starch, it is so much more general, that it is properly qualified by the subsequent paragraph which exempts tapioca, and consequently tapioca flour, one of its commercially known forms."

In other words, if the statute had said that all preparations *intended for use as starch* should be dutiable, then tapioca flour, intended for such use, would be dutiable; but, the language being *fit for use as starch*, it is

qualified by the designation *eo nomine* of tapioca.

The contrast drawn is between the phrase "intended for use as starch", and the phrase "fit for use as starch", and the ruling is that "intended for use as starch is a phrase", which, like the phrase before the Court in *Magone* vs. *Heller*, would control a denominative designation, but that "fit for use as starch" is not like the phrase in *Magone* vs. *Heller*, and is, like the phrases in the cases which preceded *Magone* vs. *Heller*, one of general description, which cannot control a denominative designation.

The *reason* for the distinction thus drawn by the Court is obvious. Fitness for use as starch is a *quality* or characteristic of certain preparations, and "all preparations fit for use as starch" is a descriptive classification of all preparations having the common quality or characteristic of being so fit. "Intended for use as starch", on the other hand, would not be a classification or description at all, because it deals with no quality or characteristic of any preparations or substances, and makes no attempt to group articles with reference to a common quality. It is, therefore, like "all substances expressly used for manure", a positive legislative enactment concerning any such substances as are actually intended for or applied to the use named, without regard to their qualities, and of controlling force as against any denominative or descriptive designation.

It must be evident from what precedes that the question of this case, as of all the cases above alluded to, is one of logic. The rule that a general description shall not prevail over a denominative designation, is, when analyzed, nothing but an expression in legal phrase of a necessary logical principle, that the special and particular must be treated as an exception to the more general and comprehensive. The Supreme Court recognized this when, in *Solomon* vs. *Arthur*, 102 U. S. 212, it said:

> "Logically, the two phrases standing together in the same act or system of laws would be related as follows: 'Goods made of mixed materials, cotton, silk, etc., shall pay a duty of thirty-five per cent; *but if* silk is the component part of chief value, they shall pay a duty of fifty per cent' ".

"*But if*" is a phrase of exception, and the conclusion is the same as the one arrived at by the Supreme Court in the case of *Chew Hing Lung* (176 U. S. 159), where effect was given to all parts of the statute by treating the special denominative designation as an exception from the general language of the paragraph concerning all preparations fit for use as starch. The Supreme Court used the language of the logicians in *Movius* vs. *Arthur*, 95 U. S. 102, when it said:

> "Patent leather, no doubt, is finished skin; but every finished skin is not patent leather",

and a logician would likewise express the proper relations to each other of the clauses here before this Court

by saying:

> "Anthracite, no doubt, is coal containing less than ninety-two per cent of fixed carbon; but not all coal containing less than ninety-two per cent of fixed carbon is anthracite."

The rule, then, both of logic and of law, being that the general shall yield to the specific, it becomes necessary, in construing a tariff act, to determine, of two conflicting clauses, which is the more specific of the two, and the cases above reviewed furnish the test by which this determination shall be made.

In a conflict between a denominative designation and a descriptive classification, the latter is the more general provision and yields to the mention *eo nomine*, which is regarded as the more specific of the two.

In a conflict between a denominative designation and such a provision as "all substances expressly used for manure", the latter is regarded as the more specific and controls. This was recognized by the Supreme Court in the Chew Hing Lung case. In contrasting the phrase "intended for use as starch" the Court said that the latter "is so much more general, that it is " properly qualified by the subsequent paragraph " which exempts tapioca". The conclusion is that " intended for use as starch " would be, like the phrase in *Magone* vs. *Heller*, much more specific, and would, for that reason, control the denominative designation.

We respectfully submit, then, that this Court was

guilty of bad logic, when it decided the Coles case upon the express ground that the phrase "all coals " containing less than ninety-two per centum of fixed " carbon " is comprehensive enough to include anthracite as well as any other kind of coal, whether specifically named or not. Mere comprehensiveness is the note of generality, and a comprehensive phrase is ordinarily regarded as so general that it is controlled by a denominative designation. Said the Court in *Arthur* vs. *Morrison*, 96 U. S. 109:

> "The argument of the Government is, that the statute in question is a comprehensive one, intended to include all articles made of silk."

And yet, in spite of the comprehensiveness of the phrase, nay, it may be said, because of its comprehensiveness, it was not allowed to prevail over the designation *eo nomine* of an article which it was, in terms, broad enough to comprehend.

So in *Arthur* vs. *Rheims*, 96 U. S. 144:

> "The general words of the act of 1872, no doubt, are sufficiently comprehensive to embrace the case before us."

But it was held that the comprehensive words of the statute must yield to a specific provision *eo nomine*.

It must now be evident to the Court that the one question of this case is whether the clause, " all coals " containing less than ninety-two per centum of fixed " carbon" is, without regard to its general or comprehensive *form*, in essence, and upon a comparison with

the denominative designation of anthracite in the free list, more general or more specific, than the denominative designation. Is it a general description within the sense and rule of Chew Hing Lung's case and the cases preceding *Magone* vs. *Heller*, and so controlled by the mention of anthracite *eo nomine;* or is it a specific, all-controlling provision like the one before the Court in *Magone* vs. *Heller*, and so not to be con trolled or excepted from by the denominative mention of anthracite?

Fortunately, the solution of this question is not a matter of mere guess work, but is to be reached by the application of a sure and simple test, which is afforded by the cases we have already considered.

And the test is this. If the clause, "containing less "than ninety-two per centum of fixed carbon", is a descriptive one, dealing with the qualities, attributes and characteristics of substances, and classifying them in accordance with and by reference to their qualities, attributes and characteristics, it is a "general description" within the meaning and rule of the decision in Chew Hing Lung's case and the other cases cited in that decision, and must yield to the denominative mention of anthracite. If, on the other hand, the clause does not deal with the qualities of things, it is a "specific provision" like the one in *Magone* vs. *Heller*, and controls the mention of anthracite in the free list.

Applying this test, it seems to us that there can be

no doubt about the essential character of the clause, and that it *classifies* coals with reference to their quality or characteristics of per centage in fixed carbon, so that all coals, whether bituminous, or lignite, or anthracite, or of any other sort, having the requisite percentage, are grouped together. In this view, percentage in fixed carbon is a *quality* of coal, just as fitness for use as starch is a quality of certain preparations, or being made of certain materials, linen, silk, cotton or worsted, is a quality of certain manufactured articles. Can there be any question that percentage in carbon is a quality of coal, in the same way as percentage in alcohol is a quality of wine, or percentage in saccharine matter is a quality of beets? But a wine is described, and can only be described, by reference to its qualities, including its age, color, aroma, taste, specific gravity and percentage in alcohol. A classification of wines would have to be by reference to one or more of these qualities, and so would, as we have seen, be a descriptive classification or a "general description". In like manner a kind of coal is described, and can only be described, by reference to its qualities, including its density, mode of fracture, properties of ignition, caloric efficiency, cleanness, specific gravity, and percentage in carbon. A classification of coals must necessarily be by reference to one or more of these qualities, and any such classification is, of equal necessity, descriptive, or a "general description" within the meaning of the Chew Hing Lung decision and the cases there cited and relied on, and, being a

mere general description, must, within the principle of that decision, yield to the denominative designation of anthracite, which is to be regarded as an exception to and not included in the comprehensive terms of the description.

The argument here presented has so far in the course of this litigation not been met. It was passed without notice in this Court's decision in the Coles case, which, as we have seen, went off upon the proposition, that the clause referring to all coals containing a certain percentage of carbon must apply to anthracite because it was broad enough in its explicit terms to include anthracite. But the question whether the clause is not essentially a descriptive one, which was presented to this Court on page 12 of the appellant's brief in that case, was not even alluded to in the opinion of the Court, and yet in view of the last decision of the Supreme Court, we find that it is the one vital question, which must be answered, if this case is to be treated according to the methods which were applied by the Supreme Court to the determination of the tapioca case.

This Court, in the Coles case, spoke of the appellant's argument as ingenious, able, earnest and difficult to answer, but we humbly submit that to so speak of it was to stigmatize it, not to answer it. We have presented here our reasons in support of the proposition that the clause in question is a general description within the sense of the Supreme Court's use of that term in the

Chew Hing Lung decision, and we submit that the argument can only be met by the production of reasons more cogent still why it should not be so considered. If it is not a general description, it behooves counsel for the government to state precisely the reasons why it is not, but this counsel has so far failed to do, and this Court has omitted to do. The fact that the argument on this point has not yet been answered suggests the possibility of its being unanswerable and therefore true.

This discussion will have been in vain if it has not prepared us to take a clearer view of the decision in the Coles case, and to perceive with distinctness the error into which this Court there fell. An analysis of the opinion discloses that the Court gave great weight to the words "not specially provided for in this act", which were regarded as a limitation upon the otherwise positive declaration that anthracite should be free of duty. Then, in looking for a provision in the act applicable to anthracite which might respond to this limitation, the Court disregarded the plain meaning of the word "specially", and recognized as a special provision for anthracite a clause in which anthracite is not named, and which could only be taken to include anthracite by reason of its being a general provision and not a special provision at all. It is evident that the Court was led to this departure from the established rule of construction in regard to the effect of denominative designation upon general descriptive clauses in a

tariff act by its anxiety to give effect to what it conceived to be the intention of Congress. This Court was apparently impressed by the historical fact that the Dingley Act changed the condition of the tariff law regarding coal by the contemporaneous amendment of both the duty list and the free list. In the duty list was inserted the clause concerning percentage of carbon, which was new to the tariff provisions, and in the free list was inserted the n. s. p. f. clause, which had not theretofore appeared in connection with the word "anthracite". The Court concluded that a change in the laws was intended, and that the precise change effected was the imposition of a duty upon all coal containing less than a certain percentage of carbon, including anthracite.

It might seem, at first blush, that Congress, by this simultaneous amendment, intended that the added words in 523 should refer to the clause concerning percentage in fixed carbon in 415. But, giving due weight to this consideration, it is submitted that what Congress actually did or intended to do must, after all, be gathered from the construction, in accordance with legal principles, of the language actually used. If Congress intended to amend the law so as to make percentage in carbon control the specific mention of anthracite in 523, it should have used language which would produce that effect. If Congress failed to use language sufficient, as a matter of law, to produce that effect, it failed in its intention. The language must

speak for itself and cannot be helped out by a guess as to the intention of Congress which was not properly expressed.

One other reason was given by this Court for its decision in the Coles case, which, for completeness, should now be alluded to. It was said (100 Fed. 446), that the views expressed by the members of Congress might be examined for the purpose of shedding light on the intention of the lawmakers.

To determine the meaning of a statute ambiguous on its face Courts may look to the history of the times (*Preston* vs. *Browder*, 1 Wheat. 115), and the general situation intended to be met and regulated (*Jennison* vs. *Kirk*, 98 U. S. 453), and may refer to the history of the act in the Legislature and the character and mode of its amendment prior to its enactment (*Blake* vs. *Natl. Banks*, 23 Wall. 307), *but can not look to the expressions of individual legislators in debate as indicating the intent of the Legislature.* The Supreme Court has frequently laid down this doctrine.

Thus in *Aldridge* vs. *Williams*, 3 How. 9 (1845), Mr. Chief Justice Taney says (p. 24):

> "In expounding this law, the judgment of the Court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will

> of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

In *U. S.* vs. *Union Pacific R. R. Co.*, 91 U. S. 72 (1875), Mr. Justice Davis says (p. 79):

> "In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge* vs. *Williams*, 3 How. 24; *Preston* vs. *Browder*, 1 Wheat. 120."

In *American Net and Twine Co.* vs. *Worthington*, 141 U. S. 468 (1891), Mr. Justice Brown says (pp. 473–74):

> "While the statements made and the opinions advanced by the promoters of the act in the legislative body are inadmissible as bearing upon its construction, yet reference to the proceedings of such body may properly be made to inform the Court of the exigencies of the fishing interests and the reasons for fixing the duty at this amount."

In the recent case of *United States* vs. *Trans-Missouri Freight Association*, 166 U. S. 290, Mr. Justice

Peckham affirms this rule, and states the reason for it as follows (p. 318):

> "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States* vs. *Union Pacific Railroad Company*, 91 U. S. 72; *Aldridge* vs. *Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell* vs. *Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen* vs. *Hertford College*, 3 Q. B. D. 693, 707.
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> "The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

The doctrine as thus stated is expressly affirmed in *Dunlap* vs. *U. S.*, 173 U. S. 65, 75.

In *Mitchell* vs. *Great Works Milling & Mfg. Co.*, 2 Story 648 (1843), Mr. Justice Story in considering the interpretation of the Bankruptcy Act of 1841, enunciates this doctrine and the reasons therefor in the plainest manner, as follows (p. 653):

> "What passes in Congress upon the discussion of a bill can hardly become a matter of strict judicial inquiry; and if it were, it could scarcely be affirmed that the opinions of a few members ex-

pressed either way, are to be considered as the judgment of the whole House, or even of a majority. But, in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute. The questions can be, and rarely are, there debated upon strictly legal grounds, with a full mastery of the subject and of the just rules of interpretation. The arguments are generally of a mixed character, addressed by way of objection, or of support, rather with a view to carry or defeat a bill, than with the strictness of a judicial decision. But if the House entertained one construction of the language of the bill, *non constat*, that the same opinion was entertained either by the Senate or by the President; and their opinions are certainly, in the matter of sanction of law, entitled to as great weight as the other branch. But, in truth, courts of justice are not at liberty to look at considerations of this sort. We are bound to interpret the act as we find it, and to make such an interpretation as its language and its apparent objects require. We must take it to be true that the Legislature intend precisely what they say, and to the extent which the provisions of the act require, for the purpose of securing their just operation and effect. Any other course would deliver over the Court to interminable doubts and difficulties, and we should be compelled to guess what was the law from the loose commentaries of different debates, instead of the precise enactment of the statute."

Jennison vs. *Kirk*, 98 U. S. 453, goes, perhaps, as far as any case in the Supreme Court on the subject. There Mr. Justice Field cites (p. 459) the remarks of a Senator in debate upon the act under consideration before its enactment, as indicating the nature of the situation for which the act was intended to provide, but

expressly limits their application to that sole purpose, saying (pp. 459–60):

> "These statements of the author of the act in advocating its adoption cannot of course control its construction where there is doubt as to its meaning."

In *Grace* vs. *Collector of Customs*, 79 Fed. 320, this Court, speaking through Judge Hawley, said, that in construing any Act of Congress, in order to ascertain the reason for, as well as the meaning of, particular provisions in it, the views of individual members in debate cannot be considered; and cited with approval this language of Judge Field in *Leese* vs. *Clark*, 20 Cal. 389:

> "It is evident that the opinions expressed by individual legislators upon the subject and effect of particular provisions of an act under discussion are entitled to very little weight in the construction of the act. The intention of the Legislature must be sought in the language of the act, and the object expressed or apparent on its face, and not by the uncertain light of a legislative discussion."

The Supreme Court *has* held that the Journals of the Houses of Congress can be consulted to learn the history of the amendment and passage of a law.

If this Court had consulted the Journals instead of the Debates, it would have found that the *Dingley Bill*, as it came from the House, where it originated (H. R. 379), imposed a duty of 75 cents upon coal, bituminous and shale, by its section 405.

And in its free list (section 504) exempted "coal, anthracite and coal stores of American vessels".

The Senate amended the bill, not only by introducing the words, "and all coals containing less than 92 per cent of fixed carbon", and lowering the rate to 67 cents, but also amended the free list by striking out anthracite altogether.

So that Mr. Vest and Mr. Allison, in the remarks relied on by this Court, were speaking of the act as originally amended by the Senate, which by a general description, imposed a duty on anthracite coal in common with all other coal, and which omitted anthracite from the free list by striking out the special provision of the House for its exemption by name.

The bill went into conference and the House agreed to the amendment by the Senate of paragraph 405, now become 415, but not to paragraph 504, as amended, now become paragraph 523. On the contrary, it put back anthracite on the free list, and though the words "not specially provided for in this act" were added to the clause, the House conferees formally reported to the House (*Cong. Rec.*, July 19, 1897, 9, 3083):

> "The free list as it passed the House is in the main adopted, except that bolting cloths and several kinds of essential oils have been added."

The same report, under the head of "Sundries", says:

> "This schedule remains substantially the same as it passed the House. Coal, however, is reduced

to 67 cents per ton, and coal slack or culm to 15 cents per ton, as proposed by Senate Amendment."

We submit, with a degree of respect for this Court which is equal to our confidence in our own position that the foregoing discussion demonstrates two things:

FIRST. The reason given by this Court in the Coles case for regarding paragraph 415 of the *Dingley Act* as a special provision for anthracite coal containing less than ninety-two per cent of fixed carbon is unsound. That that paragraph is comprehensive enough to include anthracite coming within its terms is not a reason for holding that it does include anthracite, because mere comprehensiveness is not the test. Every general description is comprehensive, but it is established by an unbroken line of authority, that a mere description, however comprehensive, must yield to a designation of an article *eo nomine*.

SECOND. The reason given by the Supreme Court in the Chew Hing Lung case for regarding paragraph 323 of the *Wilson Act* as a general description, and not a special provision for tapioca applies in full force to paragraph 415 of the *Dingley Act*. "All coals " containing less than ninety-two per centum of fixed " carbon", therefore, is a clause of a general nature, a general description, a classification of coal by refer-

ence to a quality of coal, one of its chemical attributes common to it and many other articles (all other coals), and not a demonstrative designation or a specific provision in any sense.

For this reason it must yield to the denominative designation of anthracite in paragraph 523.

It is submitted that the judgment in this case should be reversed and the cause remanded with directions to the Court below to enter judgment upon the findings in accordance with the prayer of the petition.

SMITH & PRINGLE,
Attorneys for Appellant.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of the Application of
E. C. EVANS,
For a Review of a Decision of the Board of United States General Appraisers, dated October 24th, 1899, as to the Duty to be paid on Certain Anthracite Coal.

No. 621.

BRIEF FOR APPELLEE.

MARSHALL B. WOODWORTH,
Assistant U. S. Attorney.

FRANK L. COOMBS,
U. S Attorney.

THE STAR PRESS—JAS. H. BARRY—SAN FRANCISCO.

IN THE

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BRIEF FOR APPELLEE.

With all due deference to the learned counsel for appellant, and without wishing in the least to treat disparagingly the ingenious argument he presents in support of the proposition that "all" anthracite coal should be admitted into this country free of duty, we respectfully submit that the entire question as to the dutiability of anthracite coal under paragraphs 415 and 523 of the Tariff Act of July 24, 1897 (30 Stat. at Large, p. 151, popularly known as the Dingley Act), is concluded and foreclosed by the decision of this Honorable Court in *Coles* vs. *Collector of Customs of the Port of San Francisco,* reported in 100 Fed., 442. The case of *Coles* vs. *Collector of Customs of the Port of*

San Francisco is a companion case with the one now before this Court, and it involved precisely the same propositions of fact and of law. The decision in that case was unanimously rendered, and affirmed the decision of the U. S. Circuit Court for the Northern District of California (for opinion of lower Court in that case, see 95 Fed., 954). The lower Court had affirmed the decision of the Board of U. S. General Appraisers.

When this Honorable Court affirmed the decision of the lower Court, counsel for appellant filed a petition for a rehearing, and reinforced it with supplemental petitions or briefs. The important point raised and urged to obtain a rehearing was the same which counsel now advances, viz: that the decision of the Supreme Court of the United States in the case of *Chew Hing Lung* vs. *Wise,,* rendered January 22, 1900, and reported in 177 U. S., 156, settled the law of the case. It was contended then, and it is now, that certain conclusions, which the Supreme Court of the United States arrived at in that case, govern the question of statutory interpretation involved in the case at bar.

This Honorable Court is thoroughly familiar with the case of *Chew Hing Lung* vs. *Wise.* It was, therefore, fully advised when it denied the petition for a rehearing.

Counsel then applied to the Supreme Court of the United States for a writ of certiorari. Briefs on both sides were submitted, and the Supreme Court denied the application (177 U. S., 695).

Under the circumstances, we do not think it necessary to reply to counsel at any length. We, however, take the

liberty of referring the Court to our brief submitted in the Coles case.

There is no dispute that the coal in controversy is anthracite coal containing less than ninety-two per centum of fixed carbon.

The question of law raised by counsel is so completely and effectively answered by Hon. John K. Richards, Solicitor-General, in the brief written by him in opposition to the petition filed in the Supreme Court of the United States for a writ of certiorari, that we take the liberty of incorporating his argument in this brief. The learned Solicitor-General said:

"The somewhat refined argument made by counsel for
" the importer on the analogy drawn between this case and
" the case of *Chew Hing Lung* vs. *Wise, Collector*, decided
" by the Court at this term, is unsound, and cannot be sus-
" tained. There, the Court, having found that tapioca
" flour is one of the forms of tapioca which was entitled to
" a free entry, held that the substance was *designated* by
" the term tapioca, and although it might be fit for use as
" starch, and be included in a *general description* of 'pre-
" 'parations from whatever substance produced fit for use
" 'as starch,' embraced in a paragraph laying duty on
" starch, nevertheless the designation and not the general
" description fixed its status. But there the rule was ap-
" plied to a case where the contrast was between two en-
" tirely different substances, viz, *tapioca and starch.* Here,
" however, there is no contrast, but a smaller sub-class,

" namely, *anthracite coal,* is carved out, as entitled to free " entry under certain circumstances, from the general duti- " able class of *all coals.*

"In other words, there is designation, and nothing but " designation, both in the dutiable paragraph and the para- " graph of the free list—in one, a broad but definite desig- " nation, including this coal, and in the other a subsidiary " and related designation, giving the limited right of free " entry. It is not true that the dutiable paragraph is mere " general description or descriptive classification, while the " free-list provision is specific designation. Therefore, the " rule of the decisions giving designation preference over " description does not apply. *All coals* are *designated* as " subject to duty when containing less than a certain per- " centage of fixed carbon; while *anthracite coal,* a part and " variety of *all coals,* is entitled to free entry if 'not " 'specially provided for in this Act.' If the proportion of " anthracite coals which contains less than 92 per cent. of " fixed carbon was not specially provided for in paragraph " 415, it is difficult to understand the meaning of either " paragraph; and that is the same as to say that language " could not more clearly and accurately sustain the inten- " tion of Congress and the contention of the Government " that such cargoes of coals as are here involved should pay " duty."

We concur in the closing sentiment expressed by the Honorable Solicitor-General in his brief, that the import- er's arguments can only be viewed as an illustration of the possibilities of ingenious logic.

We respectfully submit that the judgment of the lower Court must be affirmed.

MARSHALL B. WOODWORTH,
Assistant U. S. Attorney.

FRANK L. COOMBS,
U. S. Attorney.

No. 626

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

In the matter of the application of
E. C. EVANS,
For review of a decision of the Board of United States General Appraisers, dated October 24, 1899, as to the duty to be paid on certain Anthracite Coal.

Appellant's Closing Brief.

SMITH & PRINGLE,
Attorneys for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of the Application of E. C. EVANS, For review of a decision of the Board of United States General Appraisers, dated October 24th, 1899, as to the duty to be paid on certain Anthracite Coal.	No. 621.

APPELLANT'S CLOSING BRIEF.

The appellee's brief, besides repeating the criticism that our argument is "ingenious", "somewhat refined" and an "illustration of the possibilities of ingenious logic", cites from the brief of the Solicitor-General certain passages which are presented as a complete and effective answer to what has been said by us concerning the analogy between the Coles case and that of Chew Hing Lung.

The Solicitor-General attempts to distinguish these

two cases by saying, that in the Chew Hing Lung case "the contrast was between two entirely different substances, viz: tapioca and starch", but that in the Coles case there was "no contrast, but a smaller subclass, namely, anthracite coal, is carved out, as entitled to free entry under certain circumstances, from the general dutiable class of all coals".

So the Solicitor-General says that the *Wilson Act* presented a contrast between two substances, tapioca and starch, and the *Dingley Act* carves out of a general class, all coals, a subclass, anthracite.

Neither one of these statements is correct. The contrast of the *Wilson Act* is not between tapioca and starch, but between "all preparations fit for use as starch" and tapioca flour, one of many preparations fit for use as starch; and anthracite, the commercial and scientific name of a certain kind of coal, is no more a subclass of all coals than tapioca, the name of a certain substance fit for use as starch, is a subclass of all substances fit for such use. It must be readily seen that neither "tapioca" nor "anthracite" is a subclass in any sense of the word. Both are specific mentions of certain things by name, which are not classified at all, but, by reason of their being denominatively designated and not described, are taken out of and excepted from all classification, and belong to no division or subdivision of things having common qualities.

The Solicitor-General contents himself with saying

that "it is not true that the dutiable paragraph is mere "general description or descriptive classification", but he does not trouble himself to give a reason why it is not true, or to discuss or answer the reasons which we have given for holding the dutiable paragraph to be descriptive classification.

The Court will observe that this is the only reply to our contention made by one of the chief law officers of the Government, and will perhaps agree with us in thinking that the answer is neither ingenious, nor refined, nor an illustration of the possibilities of logic.

But, as the law officers of the Government persist in holding up the appellant's contention as possessed of no merit beyond that of an over-refined logical ingenuity, we shall, at the risk of being tedious, present a short summary of it, humbly begging counsel to point out upon the oral argument precisely where the reasoning ceases to be logical and becomes something else, merely ingenious, or unduly refined, or an illustration of the subtleties of logic.

Summary.

The *Dingley Act* provides that all coal containing less than ninety-two per cent of fixed carbon shall pay duty.

If the act stopped here, there would be no room for discussion, as the imported article, being coal having less of fixed carbon than the percentage named in the

act, would be clearly within its terms.

The act does not stop here, however, but provides that anthracite shall be free.

If the act stopped here, again, there would be still no room for discussion, as we should then have the case of a designation of an article *eo nomine*, which, under the well-established rule, must prevail over a general description that would otherwise embrace it.

The logical method of reading the statute, if it were so written, would be to regard it as if it were written: all coals containing less than ninety-two per cent of fixed carbon, except anthracite.

This Court did indeed say in the Coles case that such a method of reading the statute would be an *amendment* of the statute. But the remark was probably inadvertent, as to so read the statute would be not to amend it, but to *construe* it, and so to give effect to all its provisions, as is necessarily done in every case where a general description is harmonized with a denominative mention. It is always said that a designation of a thing *eo nomine* must prevail over a general description which would otherwise include or embrace the thing named. But if the general description is not allowed to include or embrace the thing named it must be because the thing named is *excepted* from the general description.

102 U. S. 212;
176 U. S. 159.

The general rule of construction, so often cited in this and similar cases, may be thus simply stated:

When provision is made for a class of things, and then another provision is made for a particular thing, designated by name, belonging to the class, the particular thing so designated is excepted from the class.

But the act does not stop here. It says that anthracite shall be admitted free, unless otherwise specially provided for in the act.

Now the Supreme Court says (176 U. S. 160) that these words are to be taken literally, strengthen the denominative mention of anthracite, and are an added declaration that anthracite shall be free, so that anthracite *shall* be free unless it is somewhere else in the act specially subjected to duty.

(This ruling differs utterly from this Court's ruling in the Coles case, that the words in question qualify the denominative mention of anthracite.)

We must, therefore, look for a special provision elsewhere in the statute applicable to anthracite.

This Court found such a special provision in the clause concerning "all coals containing less than ninety-two per centum of fixed carbon", which in the Coles case was declared to be such a special provision because the expression "*all* coal" was comprehensive enough to include anthracite. (100 Fed. 442, 444.)

But this cannot be a good reason, because every generally descriptive clause which was ever held to be con-

trolled by a mention *eo nomine* was comprehensive enough to include the article denominatively designated.

96 U. S. 109;
96 U. S. 144.

We must therefore seek another reason for regarding the clause concerning the percentage in carbon as a special provision for anthracite.

The Coles case is not the only case in which this Court has treated a comprehensive phrase as a special provision. In the tapioca case (83 Fed. 165) this Court held that the comprehensive phrase "all preparations, " from whatever substance produced, fit for use as " starch " was a specific provision for tapioca.

The reason given by this Court was, not that the phrase was comprehensive enough to include tapioca, but that it was a phrase similar to "all substances expressly used for manure" which, in *Magone* vs. *Heller*, 150 U. S. 70, had been made to control the denominative mention of sulphate of potash.

The Supreme Court held, however (176 U. S. 159), that the phrase was not similar to the one before the Court in *Magone* vs. *Heller*.

So that there are two kinds of general comprehensive clauses. One kind is controlled by a denominative mention. The other kind is not controlled by a denominative mention.

In the distinction between these two kinds of com-

prehensive phrases is to be found the key to the solution of the question in this case.

"All preparations fit for use as starch" was held by the Supreme Court to be a descriptive phrase like the phrases considered in a number of cases before the Court prior to *Magone* vs. *Heller*, and, because it was a descriptive phrase, it was made to yield to a mention of an article *eo nomine*.

"All substances expressly used for manure" was held by the Supreme Court to be not a descriptive phrase, and was therefore held to control a mention of an article *eo nomine*.

The reason for this is that "all substances used for manure" do not constitute a *class* of things. The phrase is a provision for all things coming within its terms without regard to their classification.

The distinction, therefore, is between a descriptive phrase and one which is not descriptive.

But a descriptive phrase is one which classifies things by reference to attributes or qualities which they have in common.

A phrase which does not classify, which does not group articles by reference to their common qualities, is not descriptive.

Therefore, the question of this case is whether "all "coals containing less than ninety-two per cent of "fixed carbon", is or is not descriptive.

If it is descriptive, it must, like the phrase before the Court in the tapioca case, and the phrases before the Court in the cases prior to *Magone* vs. *Heller*, yield to the denominative mention of anthracite.

If it is not descriptive, then, like the phrase in *Magone* vs. *Heller*, it is a specific provision, and must control the denominative mention of anthracite.

But that it is purely descriptive is beyond dispute, as it deals only with a quality which certain coals have in common, namely, percentage in fixed carbon. It is descriptive in the very same way and sense as "preparations fit for use as starch" was descriptive, because that phrase deals only with a quality which certain preparations have in common, namely, fitness for use as starch.

It is, therefore, not a special provision for anthracite, any more than "preparations fit for use as starch" was a special provision for tapioca.

Both phrases describe *classes* of things, from which, under the rule, things particularly mentioned by name, belonging to the class, are to be excepted.

Respectfully submitted,

SMITH & PRINGLE,
Attorneys for Appellant.